91-21

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

OVERNITE TRANSPORTATION CO.,

Petitioner,

v.

BETTY L. TIANTI, COMMISSIONER OF LABOR OF THE STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the Court of Appeals conflict with this Court's holdings in *Levinson v. Spector Motor Service,* 330 U.S. 649 (1947), *Southland Gasoline Co. v. Bayley,* 319 U.S. 44 (1943), and *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973)?

2. Is Conn. Gen. Stat. § 31-76 (1987) preempted by the Motor Carrier Act, 49 U.S.C. §§ 3101-3104 (1988)?

LIST OF PARTIES

1. Overnite Transportation Co.[1]

2. Betty L. Tianti, Commissioner of Labor of the State of Connecticut.

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[1] Pursuant to S. Ct. R. 29.1, petitioner is a wholly owned subsidiary of Union Pacific Corporation, a privately held corporation.

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DECISIONS BELOW

The decision of the United States District Court for the District of Connecticut granting summary judgment against Overnite Transportation Co. ("Overnite") in favor of Betty L. Tianti, Commissioner of Labor of the State of Connecticut (hereafter the "Commissioner"), on April 18, 1990 is reprinted in the attached Appendix at App. 7a. The *per curiam* opinion of the United States Court of Appeals for the Second Circuit affirming the decision of the district court on February 19, 1991 is reported at 926 F.2d 220 (2d Cir. 1991) and is reprinted in the attached Appendix at App. 1a.

JURISDICTION

Overnite, an interstate motor carrier, filed this action in the United States District Court for the District of Connecticut seeking a declaratory judgment that application of the Connecticut Wage and Hour Act ("CWHA"), Conn. Gen. Stat. §§ 31-76b–31-76j (1987), to certain of Overnite's employees is preempted by the federal Motor Carrier Act ("MCA"), 49 U.S.C. §§ 3101–3104 (1988). In a separate action that was consolidated with Overnite's action, the Commissioner sought overtime wages from Overnite on behalf of thirty-two of Overnite's loading dock workers. On April 18, 1990, the district court granted the motions for summary judgment filed by the Commissioner in both actions and entered judgment for the Commissioner.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court in an opinion issued on February 19, 1991. The Second Circuit denied Overnite's timely petition for rehearing and suggestion for rehearing *in banc* on April 4, 1991.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

The Constitutional provisions, statutes and ordinances involved are reprinted in the attached Appendix. The citations are as follows: U.S. Const. Arts. I, § 8, cl. 3 and VI; 28 U.S.C. §§ 1254(1), 1291, 1331 (1988); 29 U.S.C. §§ 207(a)(1), 213(a)(5), 213(b)(1), 213(b)(3) (1988); 45 U.S.C. §§ 61-66 (1988); 49 U.S.C. §§ 3101-3104 and 10521 (1988); Conn. Gen. Stat. § 31-76b-31-76j (1987); Idaho Code § 44-1502(3) (1990); Mont. Code Ann. § 39-3-406(2)(a) (1990); Nev. Rev. Stat. § 608.018(2)(g) (1989); Wash. Rev. Code § 49.46 (1989); Wash. Rev. Code § 49.46.130 (1989); Cal. Code Reg., tit. 8, § 11090 (1991); and Or. Admin. Reg. 839-20-125(3)(a) (1991).

STATEMENT OF THE CASE

Overnite is an interstate motor carrier. The Commissioner contends that Overnite is required under the CWHA to pay overtime wages to employees who work at Overnite's freight terminal in Wallingford, Connecticut and who are responsible for loading and unloading trucks that travel in interstate commerce. These "loaders" directly affect the safety of Overnite's operations in interstate commerce. *See* Joint Stipulation at App. 18a.

Overnite contends that the MCA and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1988), manifest Congress's intent to give the United States Secretary of Transportation ("Secretary") exclusive jurisdiction over Overnite's employees. Moreover, these statutes manifest Congress's intent to occupy completely this area of regulation. Therefore, the MCA preempts the CWHA as applied to Overnite's employees. Furthermore, Overnite contends that the CWHA, as applied to Overnite's employees, is preempted in that the CWHA is an impediment to the accomplishment of the congressional purpose of uniform national regulation of interstate highway safety. Overnite submits that its contentions are compelled by this Court's decisions in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947), and *Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943).

BASIS OF FEDERAL JURISDICTION

Jurisdiction in the United States District Court for the District of Connecticut was invoked under 28 U.S.C. § 1331 (1980). Jurisdiction in the United States Court of Appeals for the Second Circuit was invoked under 28 U.S.C. § 1291 (1982).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S HOLDINGS IN *LEVINSON V. SPECTOR MOTOR SERVICE*, 330 U.S. 649 (1947), *SOUTHLAND GASOLINE CO. V. BAYLEY*, 319 U.S. 44 (1943), AND *CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.*, 411 U.S. 624 (1973).

This Court should grant Overnite's petition for writ of certiorari to rectify a serious conflict that exists between the circuit courts of appeals and decisions of this Court. The Second Circuit and the other federal courts that have addressed the issue of the preemptive effect of the MCA on state overtime wage laws[2] have failed to consider the federal interstate transportation safety scheme implemented by Congress and have ignored this Court's landmark decisions in *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947) and *Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943), enforcing this congressional mandate. These courts of appeals have ignored the legislative history of the MCA and the FLSA and have failed to examine the intent of Congress with respect to uniform, national regulation of interstate highway safety. Rather, in a string of *per curiam* or conclusory opinions, which begin with an unsupported and incorrect inference in *Williams v. W.M.A. Transit Co.*, 472 F.2d

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[2] *See Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990); *Agsalud v. Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987); *Pettis Moving Co., Inc. v. Roberts*, 784 F.2d 439 (2d Cir. 1986); *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258 (D.C. Cir. 1972); *Central Delivery Service v. Burch*, 355 F. Supp. 954 (D. Md.), *aff'd*, 486 F.2d 1399 (4th Cir. 1973).

1258 (D.C. Cir. 1972), these courts conclude that states are free to require payment of overtime wages to employees whose activities affect the safety of interstate transportation without regard for the impact of such regulation.

This Court's decisions hold that Congress concluded that federal overtime wage provisions are inconsistent with the federal highway safety program regulated by the Secretary. Moreover, they compel the conclusion that Congress did not intend to allow the states to undercut this pervasive federal scheme. Consequently, and since regulation of the interstate motor carrier industry is at the heart of Congress's federal powers, traditional state police powers, including those exercised by the Commissioner under the CWHA, must be subordinated to this uniform federal scheme. *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973). Unless the Second Circuit's error is corrected, the nation's interstate motor carrier industry may be profoundly disrupted and Congress's implementation of a national safety scheme will be dismantled.

The Court of Appeals for the Second Circuit held that the MCA, 49 U.S.C. §§ 3101-3104 (1988), does not preempt the CWHA, Conn. Gen. Stat. §§ 31-76b-31-76j (1987), as applied to Overnite's loading dock workers and that Overnite is required to pay overtime wages to these employees. In its decision, the Second Circuit stated that "although § 13(b)(1) of the FLSA . . . exempts employees subject to the maximum hour limitations of § 304 of the MCA . . . from the overtime benefits provided in § 7(a)(1) of the FLSA, . . . 'Congress did not prevent the *states* from regulating overtime wages paid to workers exempt from the FLSA.' " *Overnite Transportation Co. v. Tianti,* 926 F.2d 221-222 (2d Cir. 1991) (quoting *Pettis Moving Co., Inc. v. Roberts,* 784 F.2d 439, 441 (2d Cir. 1986)) (emphasis in original) (citations omitted).

In reaching this conclusion, the court of appeals acknowledged *Levinson v. Spector Motor Service,* 330 U.S. 649 (1947), which holds that Congress did not authorize the "overlapping" of the MCA and the overtime wage provisions of the

FLSA and, therefore, that Overnite is not required under federal law to pay overtime wages to its employees. However, the Second Circuit concluded that Congress did not intend to prohibit overlapping of the MCA and state overtime wage laws in that there is no evidence of a congressional intent to "supersede the '[t]raditional police powers of the states merely because [Congress] chose not to permit these two federal statutes to 'overlap.' " *Id.* (quoting *Pettis,* 784 F.2d at 441). In so ruling, the Second Circuit failed to acknowledge congressional intent as expressed in the MCA and the FLSA, failed to uphold the federal interstate transportation safety scheme implemented by Congress, and failed to follow the holding in *Levinson.*

Under the MCA, the Secretary has *sole* jurisdiction over motor carrier workers whose duties affect the safety of operation in interstate commerce. 49 U.S.C. § 3102; *United States v. American Trucking Associations, Inc.,* 310 U.S. 534, 553, *reh'g denied,* 311 U.S. 724 (1940). Through the MCA, Congress intended to create a uniform, efficient and safe nationwide system of interstate transportation. *Bayley,* 319 U.S. at 48-49. In order to accomplish this purpose, and because of the fluctuating hours of employment endemic to the business, Congress placed complete jurisdiction and control over regulation of overtime wages paid to employees of motor carriers with the Secretary. *Id.* at 48. Consequently, workers in the trucking industry, as well as workers in the railroad, airline and shipping industries, are excluded from the jurisdiction of the Department of Labor and the overtime wage provisions of the FLSA. 29 U.S.C. § 213(a) & (b). These workers are excluded from federal overtime wage regulations because Congress believed that it was essential to the safety and efficiency of these industries that regulation be under one agency and one agency alone. *Levinson,* 330 U.S. at 678; *Bayley,* 319 U.S. at 48.

The Second Circuit ruling permits each state to regulate, individually, employees whose activities affect the safety of interstate transportation, including drivers, driver's helpers and loaders, such as Overnite's. Taken to its logical conclusion, this

decision will allow states to pass inconsistent and contradictory legislation which will affect workers in interstate transportation in different and conflicting ways as they travel from state-to-state. More to the point, this decision will allow the states to dismantle the uniform federal system of safety in interstate transportation. Thus, this decision will turn the clock back to the pre-MCA era of a complicated and inconsistent patchwork of regulation which Congress intended to remedy through the MCA. *See Levinson,* 330 U.S. at 657-59.

The burden on interstate commerce that would result from the Second Circuit's decision is best illustrated by the following actual example from the state of Washington. The state of Washington has attempted to extend its overtime wage law to truck drivers operating in interstate commerce. *See* Washington Minimum Wage Act ("WMWA"), RCW Ch. 49.46 (1989). This statute provides for mandatory overtime pay for motor carrier employees covered by the MCA if these employees are not paid overtime wages equivalent to the wages to which they would be entitled under the WMWA for hours worked over forty in the state of Washington. RCW Ch. 49.46.130 (1989). This requirement also carries with it complicated record-keeping requirements. *Id.*

Neighboring states such as Oregon, California, Idaho, Utah, Nevada and Montana exempt motor carrier employees from their overtime wage laws.[3] Because Washington's overtime wage law conflicts with the laws of these neighboring states, the flow

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[3] Or. Admin. Reg. 839-20-125(3)(a) (exempting employees whose maximum hours are regulated under the federal Motor Carrier Act from state overtime law); Cal. Code Reg., tit. 8, § 11090 (same); Idaho Code § 44-1502(3) (providing for same exemptions from state overtime law as under the Fair Labor Standards Act); Nev. Rev. Stat. § 608.018(2)(g) (exempting employees whose maximum hours are regulated by the federal Motor Carrier Act from state overtime law); Mont. Code Ann. § 39-3-406(2)(a) (same). *See also V.K. Putnam, Inc. v. McFarlane,* 779 P.2d 905 (Mont. 1989) (construing exemption in state overtime law for employees regulated under federal Motor Carrier Act). Utah does not have a general overtime compensation statute.

of interstate motor carrier commerce may be diverted to these neighboring states as carriers seek to avoid the additional expense and reporting burdens imposed by the Washington law. Moreover, the Washington act provides a strong incentive for employers to schedule their drivers to work at least part of each work week in states other than Washington in order to minimize overtime wage costs. These factors will disrupt the orderly flow of interstate commerce, increase traffic on the roads of neighboring states, increase the length of routes driven by trucks and increase the hours worked by drivers. Furthermore, Washington's neighboring states will be unfairly burdened with safety hazards posed by drivers who – because of the economic realities of the competitive interstate motor carrier business – will have their schedules manipulated to ensure that overtime hours are worked outside of Washington. In these states, traffic will be increased and, because of increased hours worked by drivers, safety will suffer.

Moreover, the Second Circuit's conclusion in this case opens the door for states to require payment of overtime wages to all categories of workers who are exempt under Section 13 of the FLSA and who are excluded from the overtime wage provisions of Section 7 of that act. Accordingly, in addition to motor carrier workers, railway, airline and other workers who are exempt from the overtime wage provisions of the FLSA, *see* 29 U.S.C. §§ 213(a) & (b) (1988), but who also have been actively and pervasively regulated under, *inter alia,* the Hours of Service Act ("HSA"), 45 U.S.C. §§ 61-66 (1988), may be regulated by the states. Under the reasoning of the Second Circuit's decision, the airline pilot who flies between Boston and Los Angeles and who is exempt from overtime wage regulation under Section 13(b)(3) of the FLSA, and the fishing boat captain who spends six weeks at sea harvesting tuna and who is exempt from overtime wage regulation under Section 13(a)(5) of the FLSA, may both be subject to state-imposed overtime wage requirements, regardless of the disruption to interstate commerce that such a patchwork of state regulation would create. Allowing states to impose this layer of regulation under the auspices of their now seemingly

omnipotent police power would destroy the fabric of the uniform federal interstate transportation safety scheme that has long been in place.

In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), this Court held that the city's traditional police powers are outweighed by the necessity of preserving a uniform federal scheme of aviation regulations. "'. . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.'" *Id.* at 625 (quoting *Cooley v. Board of Wardens*, 12 How. 299,319 (1852)). The safety program established by Congress with respect to interstate trucking is likewise so national in nature that the state's police power in this area is outweighed by "the necessity of preserving a uniform federal scheme." *Id.* The states should not be allowed to undercut the uniform federal system by legislating the payment of overtime wages.

This Court can and should prevent the confusion, inconsistency and intrusion into federal jurisdiction over interstate transportation that will be caused by the decision in this case by reaffirming the principles enunciated in *Levinson* and the congressional policy as stated in *Bayley, Burbank,* and *Levinson.* Overnite, therefore, respectfully requests that the Court grant a Writ of Certiorari in order to consider whether the uniform, efficient system of interstate trucking that Congress intended to establish should be reaffirmed.

A. The Motor Carrier Act Grants To The Secretary Of Transportation Exclusive Jurisdiction Over Employees Whose Activities Affect The Safety Of Interstate Commerce, Including Overnite's Loading Dock Workers.

The purpose of the MCA is to promote safety in interstate transportation by establishing the qualifications and maximum working hours for drivers and associated workers and to secure

an efficient system of interstate motor transportation through *uniform* regulation. *Bayley,* 319 U.S. at 48; *Commercial Standard Ins. Co., Inc. v. Robertson,* 159 F.2d 405, 409-10 (6th Cir. 1947) (emphasis added). Section 204 of the MCA defines the duty of the Interstate Commerce Commission ("I.C.C.") with respect to workers whose activities affect the safety of interstate commerce.[4]

> (1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to . . . qualifications and maximum hours of service of employees, and safety of operation and equipment.

49 U.S.C. § 304(a)(1).

The purpose of this statute is twofold: to promote safety in interstate commerce by establishing the qualifications and maximum working hours for drivers and associated workers and to secure an efficient system of interstate motor transportation through uniform regulation. *Bayley,* 319 U.S. 44, 48; *Commercial Standard Ins. Co.,* 159 F.2d 405, 409-10. The legislative history of the MCA demonstrates that Congress considered hours of service to be a critical aspect of this safety program.

> Further investigation of the need for regulation of hours of service of employees engaged in interstate transportation should hardly be necessary, because the hours of service of railroad employees has been regulated by law for 27 years and it has proven to be one of the most important provisions of all the safety regulations.

79 Cong. Rec. 12228 (1935) (Statement of Senator Monaghan).

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[4] In 1935, Congress enacted the MCA, 49 U.S.C. § 301, *et seq.*, revised in 1983 and recodified at 49 U.S.C. § 3101, *et seq.* The original MCA vested exclusive authority over motor carrier workers in the Interstate Commerce Commission. 49 U.S.C. § 304(a). That function was transferred to the Secretary of Transportation in 1966. 49 U.S.C. § 1655(e).

The MCA manifests the same congressional concern for safety that was expressed in prior federal regulation of other modes of interstate transportation. For example, Congress placed the hours and qualifications of railroad employees involved in train safety under the exclusive jurisdiction of the I.C.C. in the Hours of Service Act ("HSA"), 45 U.S.C. Section 61, *et seq.* (1988).[5] The HSA was enacted in response to the large number of railroad accidents that resulted from the effects of mental and physical strain on overworked, exhausted railroad employees. *Atchison, Topeka & Santa Fe Ry. v. United States,* 269 U.S. 266, 267-68 (1925); *Chicago & Alton Railroad Co. v. United States,* 247 U.S. 197, 199 (1918). The HSA provides direct federal regulation of the maximum hours of service of railroad employees. It thus precludes the operation of any coincident state laws, including those intended to supplement the goals of the Act. *Erie Railroad Co. v. New York,* 233 U.S. 671, 683 (1914). *See also Northern Pacific Railway Co. v. Washington,* 222 U.S. 370, 372 (1912); *Union Pacific Railroad Co. v. Woodahl,* 308 F. Supp. 1002, 1009 (D.C. Mont. 1970). Section 204 of the MCA operates in a similar fashion. *See Maurer v. Hamilton,* 309 U.S. 598, 604 (1940). Thus, both the MCA and the HSA seek to provide uniform federal control over the safety of interstate transportation.

In 1935, Congress considered an amendment to the MCA which would have provided, within the statutory language, maximum hour requirements over motor carrier workers. 79 Cong. Rec. 12228 (1935) (amendment offered by Mr. Monaghan). The proposed amendment was ultimately rejected because Congress believed that the Interstate Commerce Commission, and not Congress, was the appropriate entity to have primary responsibility over regulation of hours of service due to the complexity of interstate motor vehicle transportation and the expertise of the commission. *Id.* at 12229. Overnite submits that Congress could not have intended to undercut its delegation of overtime

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[5] This responsibility was also transferred to the Secretary of Transportation in 1966. 49 U.S.C. § 1655(e).

wage regulation of motor carrier workers to the ICC, a body with specialized expertise in this area, by allowing fifty state legislatures to adopt conflicting regulations on a piecemeal basis.

The MCA expressly provides that for employees covered by Section 3102, the states may regulate, with certain exceptions, those employees *only* with respect to: 1) payment of taxes and 2) intrastate transportation. 49 U.S.C. § 10521(b). Under the generally accepted principle of statutory interpretation, *inclusio unius est exclusio alterius,* where a statute specifically lists categories over which state regulation is permissible, unlisted categories are excluded from state regulation. *See, e.g., Andrus v. Glover Construction Co.,* 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent"); *Matter of Cash Currency Exchange, Inc.,* 762 F.2d 542, 552 (7th Cir.), *cert. denied sub nom., Fryzel v. Cash Currency Exchange, Inc.,* 474 U.S. 904 (1985) ("[e]numeration of specific exclusions from operation of statute is indication that statute should apply to all cases not specifically excluded"). The MCA explicitly enumerates taxation and intrastate trucking as exceptions to the act's delegation of exclusive authority to the Secretary. From this provision, Congress's intent is clear; but for two limited areas, states may not regulate workers covered by the MCA. Therefore, states may not require payment of overtime wages to workers covered by the MCA.

In determining whether a motor carrier's employees fall within the scope of Section 204 and under the jurisdiction of the Secretary, the fundamental test is whether the employees' activities affect the safety of operation. *Levinson,* 330 U.S. at 649, 671; *Marshall v. Union Pacific Motor Freight Co.,* 650 F.2d 1085, 1089 (9th Cir. 1981). In this case, it has been stipulated that Overnite's employees affect the safety of interstate motor

vehicle operations. *See* Appendix at App. 18a. Under the MCA, and for purposes of this analysis, Overnite's employees are in the same class as interstate truck drivers or other employees whose activities affect safety in interstate commerce.

B. Under The Fair Labor Standards Act, Congress Confirmed Its Intent That The Secretary Of Transportation Has Jurisdiction Over Highway Safety Workers And, Therefore, Over Overnite's Workers.

Congress enacted the FLSA, 29 U.S.C. § 201, *et seq.*, in the wake of the MCA. The FLSA reiterated Congress's concern for safety in interstate commerce by exempting from the overtime wage provisions contained in Section 7 of the FLSA, 29 U.S.C. § 207(a)(1), all workers whose activities affect the safety of interstate commerce and who are regulated under the MCA: drivers, drivers' helpers, loaders and mechanics. 29 U.S.C. § 213(b)(1); 29 C.F.R. § 782, *et seq.* Also excluded from these overtime wage provisions are, among others, commercial fishermen, 29 U.S.C. § 213(a), and railway and air carrier employees, 29 U.S.C. § 213(b). *See also Levinson,* 330 U.S. at 677.

In this case, the parties have stipulated that Overnite's workers are "loaders" whose activities affect the safety of interstate transportation within the meaning of the FLSA. App. at 18a. The regulations promulgated under the FLSA exclude these workers from the overtime wage provisions of the FLSA in that they are subject to the jurisdiction of the Secretary under the MCA because of their involvement with the safety of interstate transportation. 29 C.F.R. §§ 782.2(b)(1) & 782.5. *See also Levinson,* 330 U.S. at 678; *Pyramid Motor Freight Corp.,* 330 U.S. at 695, 707; *Ex parte Nos. MC-2, MC-3,* 28 M.C.C. 125, 133, 134 (1936).[6]

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[6] Whether or not the Secretary has exercised exclusive jurisdiction is of no consequence to this analysis, since "for purposes of 29 U.S.C. § 213 (b)(1) exemptions under the FLSA, the Secretary need only possess the power to regulate eligible employees, not have exercised that power." *Levinson,* 330 U.S.

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The legislative history surrounding the enactment of the FLSA sets forth the two primary concerns of Congress in exempting motor carrier workers and, therefore, Overnite's workers, from FLSA coverage: highway safety and uniform regulation of maximum hours of service of motor carrier employees by a single governmental agency, the I.C.C. This legislative history reaffirms the transportation safety goals Congress established and put into place when it enacted the HSA, covering railroad workers, and the MCA, covering motor vehicle workers.

When the congressional committee drafting the FLSA conducted its initial hearings, the I.C.C. had not yet acted to regulate the maximum hours of service of interstate motor carrier workers and these workers were not included in the original list of Section 13 exemptions from the overtime wage provisions of the FLSA. 81 Cong. Rec. 7875 (1937). After the I.C.C. enacted such regulations, Congress amended Section 13 to exclude workers covered by the MCA from the FLSA. The amendment manifests Congress's fundamental concern with safety:

> Of course safety is the important consideration. Under the Interstate Commerce Act it is provided that it shall be the duty of the Interstate Commerce Commission to regulate the qualifications and maximum hours of service of employees of common carriers. Following out that provision and with due regard to safety, the Commis-

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at 678. Once it is determined that Overnite's employees' activities affect the safety of operation, the Secretary possesses the sole and exclusive power to establish qualifications and maximum hours of service for those employees under the MCA. *See Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 708 (1947); *Peraro ex rel. Castro v. Chemlawn Services Corp.*, 692 F. Supp. 109, 113 (D. Conn. 1988); *Mingione v. New England Tallow, Inc.*, 137 Conn. 173 (1950). Indeed, it is precisely because the activities of Overnite's employees have a direct impact on interstate motor vehicle safety that Congress exempted them from the FLSA overtime wage requirements, subjecting them instead to the exclusive authority and jurisdiction of the Secretary. 29 U.S.C. § 13(b)(1). *See Peraro*, 692 F. Supp. at 109, 114; *Mingione*, 137 Conn. 173 (1950).

> sion has made a report fixing the hours of labor of bus drivers and employees. My amendment seeks only to include them, as well as railroad engineers and employees, under the terms of the bill.

81 Cong. Rec. 7875 (1937) (statement of Senator Moore, sponsor of the amendment).

Congress determined that the most efficient way to ensure safety in all modes of interstate transportation was through uniform regulation: by vesting control of the maximum hours of service of and the payment of overtime wages to all transportation workers, including railroad employees and motor carrier workers, in a single governmental agency, the I.C.C.

> [I]t was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such [a] way as not to conflict with such regulation. That action was taken with reference to maritime workers. It was taken with reference to railroad workers insofar as they were governed by the Hours of Service Act.
>
> The amendment of the Senator from New Jersey [Mr. Moore] would apply the same principle to truck drivers insofar as hours of labor are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently.

Id. (statement of Senator Black).

Congress preserved the economic goals of the FLSA by exempting motor carrier workers only from Section 7 of the Act, which includes the provision requiring one-and-one-half the regular wage for overtime hours. Motor carrier workers were, and still are, regulated under Section 6 of the FLSA with regard to minimum wages.

> [A]s the bill is now written, employees of trucking companies are included in both the minimum-wage and the maximum-hour provisions. The amendment . . . would exempt them only from the maximum-hour provision. The question of minimum wages would still be governed by the provisions of the bill. The reason why the Senator from New Jersey is offering the amendment is that the law now imposes upon the Interstate Commerce Commission the responsibility and duty of regulating hours.

Id. (statement of Senator Black).

This Court agreed with this vision of the relationship between the MCA and the FLSA in the landmark *Levinson v. Spector Motor Co.* decision:

> The logic of the situation is that Congress, as a primary consideration, has preserved intact the safety program which it and the Interstate Commerce Commission have been developing for motor carriers since 1936. To do this, Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in Section 7 of the Fair Labor Standards Act. *Such overlapping, however, has not been authorized by Congress and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act.*

Levinson v. Spector Motor Co., 330 U.S. at 661-62 (footnote omitted) (emphasis added).

According to *Levinson*, this mandate to put safety first "must" be enforced, even if certain classes of employees are excluded from certain economic benefits of the FLSA. *Id.* at 662, 667.[7] This safety mandate is equally applicable to the exclusion of workers from the economic benefits of similar state statutes, such as Connecticut's. To hold otherwise would undercut the federal interstate transportation safety scheme which identifies any overtime regulation, other than by the Secretary, to be contrary to Congress's paramount safety program. Therefore, the Second Circuit's holding in this case that, on the one hand, federally mandated overtime pay is contrary to congressional policy and, on the other hand, state mandated overtime pay is not, is not only illogical but undermines Congress's desire to achieve a uniform interstate transportation safety scheme.

Contrary to the Second Circuit's holding, *Levinson* is not limited simply to the overlapping of the FLSA's overtime provisions and the MCA; rather, it concerns itself with the much broader issue of "requiring compliance with the increased rates of pay for overtime work done *in excess of the limits set in Section 7* of the [FLSA]." *Id.* at 661 (emphasis added). Overnite contends that *Levinson* holds that while there may, in theory, be "no necessary inconsistency" between enforcing rigid maximum hours of service regulations for safety purposes and, at the same time, requiring the payment of increased pay for overtime work, Congress did *not* subscribe to this theory and did not "authorize" *any* governmental body, federal or state, to undercut its safety

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[7] Congress has amended the Section 13 list of exemptions to the FLSA many times since 1935. However, the only change to Section 13(b)(1) was made in 1966 in conjunction with the amendments to the Motor Carrier Act giving the Secretary of Transportation jurisdiction over motor carrier workers. Since that amendment did not change the substantive relationship between the Motor Carrier Act and the FLSA exemptions, Congress presumably concurred in the Supreme Court's reading of that relationship in *Levinson*.

program by requiring payment of overtime wages. Consequently, any federal *or state* requirement for the payment of overtime wages to workers covered by the MCA but who are exempt from Section 7 of the FLSA, including Overnite's loaders, should be prohibited.

As a means of carrying out its intent to "put safety first," Congress sought to create a national, uniform safety program that would take precedence over every economic regulation and every overtime wage regulation, federal or state. The states should not be allowed to undercut this overriding congressional goal of safe interstate commerce by enacting overtime wage laws.

1. The "Savings Clause" (Section 18) of the Fair Labor Standards Act does not allow the state to require payment of overtime wages to Overnite's workers.

Section 18 of the FLSA states, in pertinent part:

> (a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter *or a maximum workweek lower than the maximum workweek established under this chapter*. . . .

29 U.S.C. § 218(a) (emphasis added). Section 18 evidences Congress's intent to permit states to require payment of overtime wages *only* to workers who *are covered* by the FLSA's overtime wage provision (29 U.S.C. § 207). Section 18, by its very words, does *not* apply to employees who are not subject to the overtime wage provisions of the FLSA.[8] Since Section 13 of the FLSA

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[8] This reasoning was also accepted in *Pacific Merchant Shipping Ass'n v. Aubry*, 709 F. Supp. 1516 (C.D. Cal. 1989), *reversed*, 918 F.2d 1409 (9th Cir. 1990), which analyzed California's ability to regulate the overtime wages of seamen, who are exempt from the maximum hours regulation of the FLSA.

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exempts motor carrier workers such as Overnite's from the overtime pay provisions of Section 7, there is no "maximum workweek established under this chapter" for motor carrier workers.[9] Rather, the maximum work week and overtime wage regulations for these workers are subject to the exclusive jurisdiction of the Secretary. Since Overnite's employees' maximum hours are not controlled by the FLSA, Section 18 is not applicable to them. Therefore, the states may not regulate overtime wages for them.

This interpretation of Section 18 is entirely consistent with congressional intent that the maximum hours of service of, and the payment of overtime wages to, motor carrier employees such as Overnite's be regulated by a single governmental body: the

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> Under the FLSA, seamen are exempt from federal overtime provisions. 29 U.S.C. § 213 (b)(6). Federal law clearly preempts state law within the territorial zone if that state law conflicts with federal law. . . . Congress has spoken directly on the issue of overtime pay for seamen. Therefore, California labor laws are preempted to the extent that they presume to regulate FLSA exempt seamen, both on the high seas and within the territorial zone. Further, given Congress's exemption of these seamen from even minimal federal overtime provisions, it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause.

Id. at 1525; *see also Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d at 1427 (Copple, Sr.D.J., dissenting). Although the case was subsequently reversed, the Ninth Circuit erroneously relied on the *Williams* line of cases and the faulty reasoning applied therein to support its decision. *See Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d at 1418–19. The dissenting justice stated that the lower court's "conclusion seems not only logical, but the only reasonable inference that could be drawn from Congress's explicit exemption of seamen from the overtime provisions of the FLSA." *Id.* at 1430.

[9] Sections 7 and 18 of the FLSA must be read together when interpreting the scope of Section 18; therefore, the exemption of motor carrier workers from the maximum hour and overtime pay requirements of Section 7 extends to Section 18. *Cf. Missel v. Overnight Motor Transp. Co.*, 126 F.2d 98, 107 (4th Cir.), *aff'd*, 316 U.S. 572, *reh'g denied*, 317 U.S. 706 (1942).

Secretary of Transportation. Permitting the implementation of varying and potentially incompatible state regulations over maximum hours and overtime wages would defeat Congress's primary concerns with safety and uniformity in interstate transportation.

C. The Lower Courts Were In Error In Failing To Conclude That The Holding In *Levinson v. Spector Motor Service* Extends To State Laws That Regulate Overtime Wages.

Some courts, including the lower court in this case, have misinterpreted *Levinson*'s effect on the preemption of state laws regulating overtime wages. *See Pacific Merchant Shipping Ass'n v. Aubry,* 918 F.2d 1409 (9th Cir. 1990); *Agsalud v. Pony Express Courier Corp.,* 833 F.2d 809 (9th Cir. 1987); *Pettis,* 784 F.2d 439 (2d Cir. 1986); *Williams v. W.M.A. Transit Co.,* 472 F.2d 1258 (D.C. Cir. 1972); *Central Delivery Service v. Burch,* 355 F. Supp. 954 (D. Md. 1973). These courts have erroneously relied upon the following language from *Levinson:*

> There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in § 7 of the Fair Labor Standards Act.

Levinson v. Spector Motor Co., 330 U.S. at 661. Finding that "there is no necessary inconsistency," the courts in *Pettis, Williams* and *Central Delivery Service* then conclude that the MCA does not preempt state law.

These courts, however, failed to follow the Supreme Court in *Levinson* to its next and crucial step:

> Such overlapping, however, *has not been authorized by Congress* and it remains for us to give full effect to the safety program to which Congress has attached primary

> importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act.

Id. at 661-662 (footnote omitted) (emphasis added). There may well be "no necessary inconsistency" between a state's regulation of overtime wages and the MCA and the regulations promulgated thereunder; however, this fact is irrelevant where, as here, congressional intent to preempt an entire area of legislation is clear. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). This was the holding of the Supreme Court in *Levinson* and should have been the holding below.

This line of cases also relies upon an erroneous inference of congressional intent from Section 18 of the FLSA. *Williams*, the first in this line, found that Congress, in permitting states to require payment of overtime wages to employees covered by the FLSA, by "necessary implication" intended to allow states to require payment of overtime wages to employees *not covered* by the FLSA. *Williams*, 472 F.2d at 1261. Overnite submits that there is no support for drawing this implication, which is directly contrary to congressional intent that motor carrier workers *not* be covered by overtime wage laws and that safety, not economics, come first.[10] *Levinson*, 330 U.S. 662, 677. *See, supra*, pp. 12 to 17.

Moreover, when Congress has expressly preempted state law, savings clauses within the federal statute do not

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[10] Under generally accepted principles of statutory interpretation, " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russelo v. United States*, 464 U.S. 16, 23 (1983), (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Therefore, where Congress in Section 18 specifically permitted states to exercise authority over employees *covered* by Section 7 of the FLSA, and excluded any reference to employees *not covered* by that section, it must be presumed that Congress intended to distinguish between the two groups and purposefully excluded from Section 18 those employees, such as Overnite's, not subject to Section 7. *See id.*

preserve contrary state law. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S. Ct. 1948 (1990). Therefore, even if Section 18 of the FLSA does apply to Overnite's loaders, it does not preserve Connecticut's Wage and Hour Act. Since Conn. Gen. Stat. Section 31-76b contradicts federal law, by giving jurisdiction over motor carrier employees' overtime wages to an authority other than the Secretary, its effect is automatically preempted, even before the question of whether it applies to Overnite's loaders is reached.[11]

Furthermore, *Williams* ignores the holding in *Levinson* that disallows any overlapping of maximum hours regulation and the MCA, regardless of the fact that such overlapping may not be inconsistent, because Congress intended the MCA to occupy the entire field of maximum hours regulation of, among others, motor carrier workers.[12] *Levinson*, 330 U.S. at 662. Therefore, the lower court's reliance on the erroneously decided *Williams* line of cases is in error.

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[11] If Section 18 of the FLSA *did* allow states to require payment of overtime wages to workers exempt under Section 13 of the FLSA, then states could also regulate overtime wages to workers such as executives, seamen, camp counselors and babysitters; *see* 29 U.S.C. § 213(a); as well as motor carrier, railway and air carrier employees; *see* 29 U.S.C. § 213(b), all of whom are otherwise exempt from the FLSA's maximum hours provisions. Such a result would undermine the effectiveness of the exemption provision as a means of furthering Congress's overriding safety objectives and thus could not have been the result intended by Congress.

[12] A similar policy has emerged in the area of regulation of railway transportation. As with highway transportation, Congress demonstrated the primary importance of its concern with safety where interstate transportation was involved by exempting railroad safety workers from FLSA maximum hours and overtime wages coverage. As the Second Circuit Court of Appeals declared:

> The Fair Labor Standards Act . . . governs the wages and hours of employees in interstate commerce except, among others, those in the

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The lower court in this case followed *Pettis Moving Co., Inc. v. Roberts,* 784 F.2d 439 (2d Cir. 1986), which stated:

> None of the well-settled standards for finding preemption are shown here. The [Motor Carrier] Act regulates safety by setting maximum numbers of hours to be worked. New York does not interfere with such regulation; it merely requires that an employer pay time and one-half for all hours over forty that its employees work . . . Congress did not preempt states from regulating overtime wages paid to workers exempt from the FLSA.

Id. at 441 (citations omitted). Where the lower court and the *Pettis* court erred, however, was in their failure to recognize that Congress included regulation of "overtime wages" within the Secretary's exclusive authority and jurisdiction over "qualifications and maximum hours of service" under the MCA. Therefore, Congress did not intend that such regulation be within the jurisdiction of the states.

The *Pettis* court also erred in its statement that "[t]he [Motor Carrier] Act regulates safety [only] by setting maximum numbers of hours to be worked." *Id.* at 661. Rather, the Act gives the Secretary the power to prescribe requirements for maximum hours of service "when needed to promote safety of operation." 49 U.S.C. Section 3103(b)(2). In some cases, the Secretary has chosen to exercise that power. *See* 49 C.F.R. Section 395, "Hours

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> railroad industry. The legislative history of the section 13 exemption indicates that Congress intended to preserve that distinction. *See New Jersey Transit Policemen's Benevolent Ass'n, Local 304 v. New Jersey Transit Corp.,* 806 F.2d 451, 454 (3d Cir. 1986), *cert. denied,* 483 U.S. 1006, 107 S.Ct. 3230, 97 L.Ed. 2d 736 (1987); 82 Cong. Rec. 1698 (1937) (Statement of Rep. Mead). To hold otherwise would alter 100 years of established Congressional policy without so much as a whisper from the nation's lawmakers.

Farley v. Metro-North Commuter Railroad, 865 F.2d 33, 36 (2d Cir. 1989) (footnote omitted).

of Service of Drivers." But, as the Supreme Court in *Levinson* indicated:

> It is not necessary, as a condition precedent, to find that the Commission has exercised, or should exercise, such power by actually establishing qualifications and maximum hours of service with respect to loaders in general, corresponding to those established for drivers in general. *The existence of the power is enough.*

Levinson v. Spector Motor Co., 330 U.S. at 678 (emphasis added). *See also Peraro*, 692 F. Supp. at 113.

Pettis attempts to escape the preemptive effect of the MCA by stating that the regulation of overtime wages only constitutes "economic" regulation and, therefore, does not interfere with the MCA's "safety" concerns. In reaching this conclusion, the *Pettis* court ignored the statement in *Levinson* that the likely result of offering overtime wages is that employees would seek overtime hours to earn more money and, as a result, would more likely be tired and less aware of safety concerns.[13] *Levinson*,

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[13] As the legislative history of the MCA explicitly acknowledged, fatigue has been the major cause of accidents. 75 H.Rep. 1645 at 6 (1935).

> According to a survey made by the National Safety Council, fatigue has been a cause of accidents that exceeds all others. The report is as follows:
>
> 1. Many motor vehicle accidents occur because drivers fall asleep or become so tired that they cannot drive safely. Such accidents are much more liable to cause death (particularly of the driver) and serious injury or damage than the general run of motor vehicle accidents.
>
> 2. "Fatigued" or "asleep" accidents are more likely to occur to truck drivers than to those of private passenger cars.
>
> 3. Drowsiness is often contributed to and complicated by other factors, especially alcohol and carbon monoxide.
>
> 4. Driving excessively long hours is a common practice on American highways; but starting trips after considerable periods of wakeful-

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330 U.S. at 657. *Levinson* specifically recognized that Congress, through the enactment of the MCA, intended to place safety first and that even "economic" regulation that related to maximum hours, such as the requirement of premium pay for overtime hours worked, would have to give way to Congress's interstate transportation safety scheme.

II. THE MOTOR CARRIER ACT PREEMPTS CONNECTICUT'S WAGE AND HOUR ACT, AS APPLIED TO OVERNITE'S LOADING DOCK WORKERS.

A. Congress Intended That The Motor Carrier Act Preempt All Concurrent Regulation Of Overtime Work Conditions, Including Connecticut's Wage And Hour Act.

The Supremacy Clause of Article VI of the U.S. Constitution endows Congress with the power to preempt state law. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986). Congress may expressly define the extent to which its enactments preempt state law. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 93-96 (1983); *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, ____ U.S. ____, 111 S. Ct. 307 (1990). However, a federal statute does not have to provide explicitly

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ness (occasioned by work or even by waiting) is equally important in producing dangerous fatigue.

. . .

7. For purposes of safety legislation, the total hours on duty, including time for loading, unloading, and waiting, are the important factors – not merely the hours actually at the wheel.

. . .

9. Most of the well-run truck fleets, particularly those in which the management is actively interested in reducing accidents, and many of the individual truck owners have already adopted the safety measures voluntarily, and the only effect enforced legislation on hours of duty will have on them is to reduce competition from and chance of collision with trucks whose drivers are working dangerously long hours. *Id.*

that state laws are preempted. *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987); *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 713 (1985). Rather, Congress's intent to preempt state legislation "may be presumed when the federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.' " *International Paper Co. v. Ouellette,* 479 U.S. at 491 (quoting *Hillsborough County v. Automated Laboratories, Inc.,* 471 U.S. at 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)).

To determine the preemptive effect of a federal statutory scheme, the Court must look to the statutory language and history, the subject matter of the regulated field, the interest in uniformity, the pervasiveness of the scheme and the impediments the particular state regulation might pose to the federal objectives. *Bellmore v. Mobil Oil Corp.,* 783 F.2d 300, 304 (2d Cir. 1986); *Mobil Oil Corp. v. Karbowski,* 667 F. Supp. 927, 933 (D. Conn. 1987), *aff'd,* 879 F.2d 1052 (2d Cir. 1989). Viewed under these standards, Connecticut's overtime exemption provision is preempted by the MCA.

Congress, by making the Secretary's authority and jurisdiction over employees who affect the safety of operations in interstate commerce exclusive and comprehensive intended to leave "no room for supplementary state regulation." This intent is, as described above, abundantly and repeatedly evident in the plain language of the MCA, the fact that section 10521(b) of the MCA provides that states may regulate only taxation and intrastate transportation of motor carrier workers, the subsequent exclusion of motor carrier workers from the overtime wage provisions of the FLSA, the legislative history surrounding the enactment of the Section 13(b) exemptions to the FLSA, the regulations enacted pursuant to the FLSA and the judicial interpretation of the relationship between the MCA and the FLSA in *Levinson v. Spector Motor Service,* 330 U.S. 649 (1947). These factors establish that the MCA's preemption of *any* concurrent state jurisdiction over or regulation of payment of overtime wages

to highway safety employees such as Overnite's dock workers was "the clear and manifest purpose of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Congress could not have been more clear in its desire to "put safety first" by vesting exclusive authority and jurisdiction over these employees in the Secretary of Transportation. *Levinson*, 330 U.S. at 677. The MCA thus preempts contrary state law.[14]

B. Connecticut's Overtime Wage Exemption Provision Stands As An Obstacle To The Purposes Of The Motor Carrier Act.

A state law will also be found to be preempted to the extent that it "actually conflicts with a federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). Such a conflict will be found when the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " or if it interferes with the methods by which the federal statute was designed to reach this goal. *International Paper Co. v. Ouellette*, 479 U.S. at 492 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258 (D.C. Cir. 1972); *Mobil Oil Corp. v. Karbowski*, 667 F. Supp. 927, 932 (D. Conn. 1987).

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[14] The fact that the Secretary may not have exercised his exclusive authority and jurisdiction is of no consequence to this preemption analysis, as the court specifically recognized in *Peraro*: "for purposes of 29 U.S.C. Section 213(b)(1) exemptions under the FLSA, the Secretary need only possess the power to regulate eligible employees, not have exercised that power." *Peraro ex rel. Castro v. Chemlawn Services Corp.*, 692 F. Supp. at 114; *see Levinson v. Spector Motor Service*, 330 U.S. at 678. The critical fact is that the Secretary possesses the exclusive power to establish qualifications and maximum hours of service for Overnite's dock workers because, as stipulated and described above, their job activities affect the safety of interstate motor vehicle operations. *See* Joint Stipulation at App. 18a, *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 708 (1947); *Peraro*, 692 F. Supp. at 113; *Mingione v. New England Tallow, Inc.*, 137 Conn. 173, 75 A.2d 388 (1950).

Congress enacted Section 204 of the MCA to promote safety in interstate commerce by establishing the qualifications and maximum working hours for drivers and associated workers and to secure an efficient system of interstate motor transportation through uniform regulation. *Bayley,* 319 U.S. at 48; *Commercial Standard Ins. Co.,* 159 F.2d at 409-10. Connecticut's overtime wage exemption provision, as well as any similar state or federal requirement of overtime pay, interferes with the manner in which the MCA was designed to reach its objectives in the same way that application of the FLSA's overtime wage provisions would interfere with such objectives.[15] And, as *Levinson* instructed, where the safety concerns of the MCA come up against the economic concerns of a compulsory overtime pay statute such as the FLSA or the CWHA, the economic concern necessarily " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " 479 U.S. at 492; *Mobil Oil Corp. v. Karbowski,* 667 F. Supp. at 932; and must give way to the "safety program to which Congress has attached primary importance." *Levinson,* 330 U.S. at 661-62; *see also Burbank,* 411 U.S. at 625. This safety program is to be given "full effect" by the courts, "even to the corresponding exclusion by Congress of certain employees from the benefits of [these] compulsory overtime pay provisions."[16] *Levinson,* 330 U.S. at 662. Therefore, the CWHA is preempted. *See International Paper Co. v. Ouellette,* 479 U.S. at 492.

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[15] Since the FLSA's overtime wages interfere with the MCA's objectives, then state overtime pay provisions must do likewise.

[16] This national uniform interstate transportation safety provision is of such importance that it has been found to override an individual's right to privacy. *See, e.g., Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602 (1989); *International Brotherhood of Teamsters, et al. v. DOT,* 1991 U.S. App. LEXIS 7352 (9th Cir. 1991). In these cases, again, the Secretary has been given oversight responsibilities over the issues involved because of their impact on transportation safety.

CONCLUSION

In holding that a state may regulate the overtime wages of employees exempt from the overtime wage provisions of the FLSA, the lower court rendered nugatory the Section 13 exemptions to the FLSA and Congress's overriding safety concerns embodied in the MCA. The lower court's holding is inconsistent with the basic congressional intent that the maximum hours of service of, and the payment of overtime wages to, motor carrier employees such as Overnite's be regulated by a single governmental body: the Secretary. Permitting the implementation of varying and potentially incompatible regulations of overtime wages by a variety of federal agencies and individual states would defeat Congress's primary concern with safety and uniformity in interstate transportation. The only conclusion that is consistent with Congress's intent is that the MCA preempts state overtime wage regulations, as applied to Overnite's employees.

Respectfully submitted,

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June 28, 1991

No. _____

In The

Supreme Court of the United States

October Term, 1990

OVERNITE TRANSPORTATION CO.,

Petitioner,

v.

BETTY L. TIANTI, COMMISSIONER OF LABOR OF THE STATE OF CONNECTICUT,

Respondent.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 846 – August Term, 1990

(Argued: January 7, 1991

Decided: February 19, 1991)

Docket No. 90-7754

OVERNITE TRANSPORTATION CO.,

Plaintiff-Appellant,

– v. –

BETTY L. TIANTI, Commissioner of Labor
of the State of Connecticut,

Defendant-Appellee.

Before:

FEINBERG, NEWMAN and MCLAUGHLIN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Alan H. Nevas, *District Judge*, entered upon a motion for summary judgment concluding that the Motor Carrier Act, 49 U.S.C. § 3101 *et seq.*, and the exemptions to the Fair Labor Standards Act, 29 U.S.C. § 2131(b)(1), do not preempt the Connecticut Wage and Hour Act, Conn. Gen. Stat. § 31-76c, and that interstate trucking company was not exempt from provision overtime benefits under the Connecticut law. Affirmed.

STEVEN R. HUMPHREY, Hartford, Connecticut (Robert A. Izard, Jr. and Duncan Ross MacKay, Robinson & Cole, Hartford, Connecticut, of counsel) *for Appellant.*

PATRICIA M. STRONG, Assistant Attorney General (Clarine Nardi Riddle, Attorney General of the State of Connecticut, Hartford, Connecticut) *for Appellee.*

PER CURIAM:

Plaintiff-appellant Overnite Transportation Co. ("Overnite"), an interstate trucking concern, filed this action against defendant-appellee Betty L. Tianti, Commissioner of Labor of the State of Connecticut (the "Commissioner") seeking a declaratory judgment that it is not obligated to pay overtime wages to its loading dock employees who work more than forty hours in one week. In a separate action that was consolidated with Overnite's suit, the Commissioner, on behalf of thirty-two loading dock workers, sought overtime wages from Overnite.

On cross-motions for summary judgment, the district court found that (1) Overnite's loading dock employees were not exempt from the overtime wage provisions of the Connecticut Wage and Hour Act (the "WHA"), Conn. Gen. Stat. § 31-76b *et seq.;* and (2) the WHA is not preempted by the Motor Carrier Act ("MCA"), 49 U.S.C. § 3101 *et seq.*, and the exemptions to § 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(b)(1). We affirm.

Section 31-76c of the WHA provides that any employee who works more then forty hours per week is entitled to one and one half times his regular hourly wage. *See* Conn. Gen. Stat. § 31-76c. The overtime wage requirements of § 31-76c are not applicable, however, to

> any driver or helper, excluding drivers or helpers employed by exempt employers, with respect to whom the Interstate Commerce Commission or the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of applicable federal law or regulation.

Conn. Gen. Stat. § 31-76i.

Overnite claims that its loading dock employees are "helpers" under the WHA and thus are exempt under § 31-76i. Overnite makes this argument notwithstanding its concession that its loading dock employees are "loaders" under the FLSA. *See* 29 C.F.R. § 782.2 (b)(2) (listing loaders as one of the employees exempt from § 7 of the FLSA); 29 C.F.R. § 782.5 (defining loaders).

We reject this argument. When the Connecticut legislature enacted § 31-76i in 1967, it was virtually identical to its federal counterpart, § 13(b) of the FLSA, 29 U.S.C. § 213(b), which exempts federal overtime wage laws for *"any employee* with respect to whom the Secretary of Transportation has the power to establish qualifications and maximum hours of service." (emphasis added). *See* Conn. Pub. Act No. 493 § 8(a) (1967).[1] *"[A]ny employee"* is defined as drivers, driver's helpers, loaders and mechanics. 29 C.F.R. § 782.2(b)(2). The Connecticut statute was amended in 1969 changing "any employee" to "any driver, excluding drivers employed by exempt employers." *See* Conn. Pub. Act No. 548 (1969). In 1971, § 31-76i was amended again to change "any driver, excluding drivers employed by exempted employees" to its present form exempting "any driver or helper, excluding drivers or helpers employed by exempt employers." *See* Conn. Pub. Act No. 93 (1971).

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[1] The original version of § 37-76i read "the interstate commerce commission" rather than "the Secretary of Transportation." *See* Conn. Pub. Act No. 493 § 8(a) (1967). Authority over motor carrier workers was transferred from the Interstate Commerce Commission to the Secretary of Transportation in 1966. *See* 49 U.S.C. § 1655(e).

This legislative history amply supports the district court's conclusion that § 31-76i does not equate "loaders" with "helpers" (as defined in WHA § 31-76c) or "driver's helpers" (as defined in 29 C.F.R. § 782.4), and does not exempt loaders from the overtime wage benefits of § 31-76c. Clearly, had Connecticut intended the WHA exemptions to be identical to the exemptions provided under the FLSA, it would have retained the original language of § 31-76i. Accordingly, we find that Overnite is not exempt from providing overtime wages to its loading dock employees under Connecticut's WHA.

Overnite also challenges the district court's conclusion that neither the MCA nor the exemptions of the FLSA preempt the Connecticut wage law. Overnite concedes tht to find error with the district court's conclusion, we must overrule our decision in *Pettis Moving Co. v. Roberts,* 784 F.2d 439 (2d Cir. 1986). In *Pettis,* we held that although § 13(b)(1) of the FLSA, 29 U.S.C. § 213(b)(1),[2] exempts employees subject to the maximum hour limitations of § 304 of the MCA, 49 U.S.C. § 304,[3] from the overtime benefits provided in § 7(a)(1) of the FLSA, 29 U.S.C. § 207,[4]

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[2] The provisions of Section 207 of this title shall not apply with respect to – any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49.

29 U.S.C. § 213(b)(1).

[3] Section 304 which was repealed, Pub. L. No. 95-473 § 4(b), Oct. 17, 1978, *see Pettis,* 784 F.2d at 441, was subsequently reenacted, Pub. L. No. 97-449, Jan. 12, 1983, and is codified at 49 U.S.C. § 3102(b)(1). Section 3102(b)(1) provides that

> [t]he Secretary of Transportation may prescribe requirements for qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier.

49 U.S.C. § 3102(b)(1).

[4] Section 7(a)(1) provides that

> [e]xcept as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in

(Continued on following page)

see 29 U.S.C. § 213(b)(1), "Congress did not prevent the *states* from regulating overtime wages paid to workers exempt from the FLSA." *Pettis*, 784 F.2d at 441 (emphasis added). *Pettis* thus concluded that because New York's overtime wage law did not interfere with the MCA's regulation of safety, it was not preempted. See id.

Overtime [sic] claims, however, that *Pettis* misinterpreted *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947). In *Levinson*, the Supreme Court explained that although there was "no necessary inconsistency" between the enforcement of both the MCA's maximum hour limitations, imposed for reasons of safety and the FLSA's overtime wage regulations, Congress did not authorize such "overlapping". *Id.* at 661-62. Our position in *Pettis*, which we reaffirm here, is that Congress did not intend to supersede the "[t]raditional police powers of the states" merely because it chose not to permit these two federal statutes to "overlap." *Pettis*, 784 F.2d at 441. Congress' intent to allow state regulation to coexist with the federal scheme can be found in § 18(a) of the FLSA, which explicitly permits states to mandate greater overtime benefits. *See* 29 U.S.C. § 218(a). We also note that every Circuit that has considered the issue has reached the same conclusion – state overtime wage law is not preempted by the MCA or the FLSA. *See, e.g., Agsalud v. Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987); *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258 (D.C. Cir. 1972); *Central Delivery Service v. Burch*, 355 F. Supp. 954 (D. Md.), *aff'd mem.*, 486 F.2d 1399 (4th Cir. 1973).

(Continued from previous page)

commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

Overnite's further claim that the viability of *Pettis* has been called into question by *Farley v. Metro-North Commuter Railroad*, 865 F.2d 33 (2d Cir. 1989), must also be rejected. *Farley* involved overtime wage claims brought by certain employees of the Metro-North Commuter Railroad. Significantly, however, the employees claimed that they were entitled to overtime wages pursuant to § 7 of the FLSA, not a state statute. We held that Metro-North remained "subject to the provisions . . . of the Interstate Commerce Act," 29 U.S.C. § 213(b)(2), and thus exempt from § 7 of the FLSA, notwithstanding its exemption from the Interstate Commerce Act regulations, provided the regulations "were 'not necessary to carry out the [national] transportation policy.' " *Farley*, 865 F.2d at 36 (quoting 49 U.S.C. § 10505(a)(1)(1982)) (footnote omitted).

Overnite does not challenge the appropriateness of the FLSA's § 13(b)(1) exemption and its employees do not seek overtime wages pursuant to § 7(a)(1) thereof. Rather, this case concerns a state law regulating overtime wages. We conclude that *Farley* is inapplicable and that *Pettis* is controlling. Overnite's preemption argument thus must be rejected.

We have considered Overnite's remaining contentions and find them to be without merit. Accordingly, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

BETTY L. TIANTI, COMMISSIONER OF LABOR, EX REL. ALEXANDER ARISCO, ET AL.	:	
v.	:	Civil No. H-89-56 (AHN)
OVERNITE TRANSPORTATION CO.	:	*Consolidated With*
OVERNITE TRANSPORTATION CO.	:	
v.	:	Civil No. H-88-637 (AHN)
BETTY L. TIANTI, COMMISSIONER OF LABOR OF THE STATE OF CONNECTICUT	:	

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

These consolidated actions concern the obligation of Overnite Transportation Co. ("Overnite") to pay overtime wages to its loading dock workers. Overnite claims that these workers fall outside the general entitlement to overtime pay contained in Conn. Gen. Stat., Section 31-76c because they qualify for the "helper" exemption in Conn. Gen. Stat., Section 31-76i(a). It further argues that even if this exception does not apply, the Connecticut statute is preempted by federal law which clearly excludes the workers from entitlement to overtime pay. Pursuant to Conn. Gen. Stat., Section 31-68 the workers have authorized Betty L. Tianti, the Connecticut Commissioner of Labor ("the Commissioner"), to litigate their claims. The parties have filed cross motions for judgment on the pleadings or, in the alternative, for summary judgment. For the reasons explained below,

the Court grants summary judgment in favor of the Commissioner.[1]

I. Background

The parties have filed a stipulation of undisputed facts which sets forth virtually all the facts material to the summary judgment motions. The remaining material facts are not disputed. The thirty-two individual plaintiffs in action No. H-89-56(AHN) ("the employees") are past and present workers at Overnite's Wallingford, Connecticut trucking terminal. They are responsible for loading and unloading trucks which travel in interstate commerce. The employees do not travel with the trucks once they leave the terminal but conduct their work exclusively at the loading dock. At various times between July 21, 1984 and September 18, 1987 the employees worked in excess of forty hours per week but received no overtime wages. If the employees had been paid time and one-half for that overtime they would have received, collectively, $27,322.72 more than was actually paid. Overnite, and not the employees, determines whether an employee works overtime and how many hours of overtime he or she works.

On September 14, 1988 Overnite commenced action No. 88-637(AHN) in this court seeking a declaratory judgment that (1) it was not obligated to pay the employees overtime under the Connecticut Wage and Hour Act, Conn. Gen. Stat., Section 31-76b *et seq.* ("the WHA") and (2) even if it was required to do so the WHA, as applied to the employees, is preempted by the federal Fair Labor Standards Act, 29 U.S.C., Section 201 *et seq.* ("FLSA") which does not require the payment of overtime wages. On January 3, 1989 the Commissioner commenced her own action under the WHA in Connecticut Superior Court. Overnite, a Virginia corporation, removed that action to this court

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[1] Because the ruling on summary judgment is dispositive, the court will not consider the motions for judgment on the pleadings.

on January 31, 1989. On April 27, 1989 the court ordered the two cases consolidated for discovery and trial.

II. Discussion

A.

The Commissioner makes no claim that the employees are entitled to overtime wages under the FLSA. Her sole claim is under the broad provisions of the WHA:

> No employer, except as otherwise provided herein, shall employ any of his employees for a workweek longer than forty hours, unless such employee receives remuneration for his employment in excess of the hour above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Conn. Gen. Stat., Section 31-76c. Overnite concedes that absent an applicable exception this provision would require it to pay overtime wages to the employees. The exceptions to the WHA are set forth in section 31-76i:

> The provisions of sections 31-76b to 31-76j, inclusive, shall not apply with respect to . . . *any driver or helper,* excluding drivers or helpers employed by exempt employers, with respect to whom the Interstate Commerce Commission or the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of applicable federal law or regulation. . . .

(Emphasis added).

Overnite claims that the employee qualify as "helpers." Its argument derives from the reference in section 31-76i to the regulatory power of the Interstate Commerce Commission

("ICC") and the Secretary of Transportation ("the Secretary").[2] The statute incorporates federal regulatory law by reference, defining "driver" or "helper" as employees with respect to whom the Secretary has power to establish qualifications and maximum hours. Overnite further points to this court's decision in *Perraro v. Chemlawn Serv. Corp.*, 692 F. Supp. 109 (D. Conn. 1989) (Nevas, J.), in which it was held, referring to the "driver" exemption in section 31-76i, that "there seems little doubt that the Connecticut provision is intended to parallel its federal analog." *Id.* at 115. The FLSA indeed contains an exemption provision analogous to the WHA in 29 U.S.C., Section 213(b), which provides exemptions from overtime wage requirements for "any employee with respect to whom the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49." The Secretary enumerated the classes of employees exempted under this provision in regulations codified at 29 C.F.R., Section 782. They are: Drivers (section 782.3), Drivers' Helpers (section 782.4), Loaders (section 782.5) and Mechanics (section 782.6).

Overnite argues that the exemption for "Helpers" in the WHA was intended to parallel the "Loaders" exemption in the regulations promulgated by the Secretary.[3] The Secretary's definition of "Loader" would appear to bolster this point:

> A 'loader' . . . [is one] whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country. *A 'loader' may be called by another name, such as 'dockman,' 'stacker,' or 'helper'.* . . .

29 C.F.R., Section 782.5(a) (emphasis added). But while the Secretary appears to consider the term "loader" to be synonymous

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[2] In 1966 Congress transferred all powers formerly vested in the ICC to the Secretary. Department of Transportation Act, Pub. L. No. 89-670, Section 3, 80 Stat. 931 (1966), *codified at* 40 U.S.C., Section 1653(b).

[3] Neither party argues that the workers qualify as "Drivers" or "Mechanics."

in some circumstances with the ten "helper," the views of the Secretary shed no light on the question of whether "helper" in the *Connecticut* statute was intended to be synonymous with the federal "loader" category. Unfortunately, the WHA contains no definition of "helper" and there are no reported Connecticut cases construing the term. The alternative to equating "helper" with "loader" would be to find a parallel with the category "driver's helper." While this view, urged by the Commissioner, faces the same problem of the lack of statutory or judicial definition, it does find support in the chronology of amendments to Conn. Gen. Stat., Section 31-76i(a). As originally enacted in 1967, the statute exempted from overtime wage requirements "any employee with respect to whom the interstate commerce commission has power to establish qualifications and maximum hours of service."[4] Conn. Public Act No. 493 Section 8(a) (1967). The I.C.C. regulations in force at the time[5] were virtually identical to the current regulations in their exemption of Drivers, Drivers' Helpers, Loaders and Mechanics and in their definitions of each exempted category. Thus, the Connecticut statute originally exempted all four categories.

In 1969 Connecticut amended section 31-76i(a), changing the phrase "any employee with respect to whom the interstate commerce commission has power to establish qualifications and maximum hours of service" to "any driver, excluding drivers employed by exempted employers." Conn. Public Act No. 548 (1969). This amendment altered the scope of the exemption from Drivers, Drivers' Helpers, Loaders and Mechanics to only Drivers. Finally, in 1971, the statute was amended for a third time and Helpers were added to the exemption for Drivers. Conn. Public Act No. 93 (1971). This is the present form of the

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[4] Given that all functions of the I.C.C. were transferred to the newly created Department of Transportation in 1966, one year prior to enactment of this statute, it is unclear why reference is not made to the Secretary instead of the I.C.C.

[5] 13 Fed. Reg. 2349-51 (April 30, 1948), *as amended* at 28 Fed. Reg. 11686 (Nov. 1, 1963), *codified at* 29 C.F.R., Section 782.3-Section 782.6 (1967).

statute. To say that the legislative history of this last amendment is scant is an understatement; in its entirety it consists of two paragraphs, one of seven lines and one of six lines. In the House, Representative Badolato stated that the bill "adds to the exceptions to the payment of overtime under our state statutes the helpers who would be covered under the Fair Labor Standards Act of the United States Government." 110 Conn. House Proc., 1971 Sess. 1101 (1971). In the Senate, Senator Smith stated: "This bill simply adds helpers to those drivers who are now presently exempted from the provisions of our state statutes 31-76b to 31-76j of the Connecticut General Statutes." 78 Conn. Sen. Proc., 1971 Sess. 987 (Apr. 13, 1971). There were no other remarks on the floor of either chamber.

A number of conclusions flow from this chronology. First, the 1969 amendment manifested an intent on the part of the Connecticut legislature to break from the four categories of exemptions contained in the Secretary's 1967 regulations and to exempt only drivers. *Waterbury Petroleum Prod., Inc. v. Canaan Oil and Fuel Co.*, 193 Conn. 208, 232, 477 A.2d 988, 1001-1002 (1984) ("in construing legislative enactments, we presume that amendments to a statute effect a change in the existing law.") This change was not insubstantial. The I.C.C. and later the Secretary had exempted four categories of workers since at least 1948; Connecticut, by contrast, had only regulated overtime wages for two years prior to the 1969 amendment and the original legislation had adopted the Secretary's approach in its entirety. To depart from these well established regulations so soon after commencing regulation and to delete three of the four categories indicates a special concern on the part of the legislature with the one remaining category, "Drivers." The 1971 amendment must be viewed against the backdrop of this decisive action. If in 1969 the legislature was concerned exclusively with drivers, it follows that the next class of workers it exempted in 1971 would be those who help drivers and not those, such as "loaders," who perform some wholly unrelated function. There is no overlap between the two categories, since the Secretary's regulations in force in 1971 defined a "loader" as one "other than a

. . . driver's helper." 29 C.F.R., Section 782.5(a) (1971). To define "helper" as "loader" would therefore attribute no logical sequence to the two amendments.

Second, the legislative history of the 1971 amendment, meager as it is, suggests that the Legislature equated helpers with drivers. Representative Badolato described the exemption as concerning "the helpers who would be covered under the Fair Labor Standards Act of the United States Government." 110 Conn. House Proc., 1971 Sess. 1101 (1971). The only "helpers" covered under that Act are the "Drivers Helpers" defined in 29 C.F.R., Section 782.3. Similarly, Senator Smith stated that the amendment "simply adds helpers to those drivers who are now presently exempted from the provisions of our state statutes. . . ." 78 Conn. Sen. Proc. 1971 Sess. 987 (Apr. 13, 1971). His mention of the two categories in tandem indicates some relation in function or status.

Third, the Secretary's regulations themselves use the term "helper" throughout section 782.3 as a short-hand reference for "Drivers' Helpers." For example, subsection (a) states that the definition "has classified all such employees, including armed guards on armored trucks and conductorettes on buses, as *'helpers'* . . ." (emphasis added). Subsection (b) states that "[a]n employee may be a *'helper'* under the official definition even though such safety-affecting activities constitute but a minor part of his job" (emphasis added). Subsection (c) provides that the definition "has been held inapplicable to so-called *helpers* who ride on motor vehicles but do not engage in any of the activities of *'helpers'* which have been found to affect directly the safety of operation of such vehicles in interstate or foreign commerce" (emphasis added). It is not unreasonable to presume that the Connecticut Legislature simply adopted this shorthand method of reference in 1971, believing that anyone reading the federal definition would understand "helper" to be a synonym for "driver's helper."

In sum, the court holds that the exemption for "Helpers" in Conn. Gen. Stat., Section 31-76i(a) parallels the exemption for "Driver's Helpers" in 29 C.F.R., Section 782 and not the exemption for "Loaders" in 29 C.F.R., Section 782.5. Since the parties have stipulated that Overnite's dock workers fall within the definition of "Loaders,"[6] they do not qualify for an exemption from overtime pay under Connecticut law.

B.

In the alternative, Overnite argues that if Connecticut law does not provide an exemption for its workers that law if inconsistent with and preempted by federal law which does provide an exemption. A state's traditional police powers, such as are involved in Connecticut's regulation of overtime wages, are not preempted by federal law unless preemption "was the clear and manifest purpose of Congress." *Ray v. Atlantic Richfield*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Here, Congress has enacted a provision which "explicitly permits states to set more stringent overtime provisions than the FLSA." *Pettis Moving Co., Inc. v. Roberts*, 784 F.2d 439, 441 (2d Cir. 1986); *Perraro*, 692 F. Supp. at 114. Section 218(a) of Title 29 provides:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law . . . establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter.

It is true that the FLSA was superseded by the Motor Carrier Act, 49 U.S.C., Section 3101 *et seq.* ("MCA"), in that employees subject to regulation first by the I.C.C. and later the Secretary are exempt from the FSLA's overtime wage provisions. *See* 29 U.S.C., Section 213(b)(1). But several circuit courts, including

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[6] Stipulation with Issues of Law at para. 8.

the second circuit, have held that the MCA does not diminish the force of section 218(a). *Agsalud v. Pony Express Courier Corp. of America,* 833 F.2d 809, 810 (9th Cir. 1987); *Pettis,* 784 F.2d at 441; *Central Delivery Serv. v. Burch,* 486 F.2d 1399 (4th Cir. 1973), *mem. aff'g* 355 F. Supp. 954 (D. Md.); *Williams v. W.M.A. Transit Co.,* 472 F.2d 1258 (D.C. Cir. 1972). Overnite argues that *Pettis,* the controlling precedent in the second circuit, holds that the FLSA was intended as a safety regulation and that it only has preemptive force against state laws which have a similar purpose. Where state law serves as an *economic* regulation, it argues, there is no preemption. Overnight relies for this argument on the following passage in *Pettis:* "[i]n short, this court will not convert a federal law that regulates safety into one that preempts states from exercising their traditional powers of economic regulation." 784 F.2d at 441. Overnite asserts that the WHA regulates safety and is thus within the class of statutes held to be preempted by *Pettis.*

The court reads *Pettis* more expansively. The passage quoted above is the very last sentence in the opinion and appears to be less the statement of a restrictive rule than a summary of what the court had done in that particular case. This reading supported by the fact that the sentence is footnoted with a citation to *Central Delivery Serv., supra,* for the proposition that "Department of Transportation regulations do not even preempt state *safety* regulations that do not interfere with federal regulations." 784 F.2d at 441 n.6 [emphasis in original].[7] Moreover, the discussion earlier in the opinion does not describe the state

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[7] *Central Delivery Serv.* involved a Maryland Wage and Hour statute similar to the WHA. The District Court held:

> It appears therefore that even if the requirement of the 1970 Maryland Act that higher rates be paid for all work over 40 hours should be construed as affecting the safety of motor carrier operations, there is no provision in the Motor Carrier Act or the Regulations [promulgated by the Secretary] which would prevent its enforcement.

355 F. Supp. at 959.

statute as failing to interfere with federal law because it is an economic as opposed to a safety regulation. Rather, the test is described as one of actual interference or a clear manifestation of Congressional intent to preempt:

> None of the well-settled standards for finding preemption are shown here. The [Motor Carrier] Act regulates safety by setting maximum numbers of hours to be worked. New York does not interfere with such regulation; it mererly requires that an employer pay time and one-half for all hours over forty that its employees work . . . Congress did not prevent the states from regulating overtime wages paid to workers exempt from the FLSA.

Id. at 441 [citations omitted]. When applied to the WHA, these two criteria compel the same result as in *Pettis.* First, the same provision of the FLSA, 29 U.S.C., Section 218(a), is a clear statement by Congress that states are free to enact more stringent overtime wage provisions. Second, the WHA, like the New York statute in *Pettis,* does not require employees to work more hours than the maximum prescribed by the MCA, simply that they be paid overtime when they work more than forty hours. Accordingly, the court finds that the WHA is not preempted.

Conclusion

For the foregoing reasons, the Commissioner's motion for summary judgment is granted and Overnite's motion for summary judgment is denied. Both motions for judgment on the pleadings are denied as moot.

SO ORDERED this 18th day of April, 1990 at Hartford, Connecticut.

/s/ Alan H. Nevas
Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

BETTY L. TIANTI, COMMISSIONER OF LABOR, ex rel. ALEXANDER ARISCO, et al.	
v.	: CIVIL ACTION NO. H-89-56 (AHN)
OVERNIGHT TRANSPORTATION CO.	
OVERNIGHT TRANSPORTATION CO.	
v.	: CIVIL ACTION NO. H-88-637 (AHN)
BETTY L. TIANTI, COMMISSIONER OF LABOR OF THE STATE OF CONNECTICUT	: AUGUST 8, 1989

STIPULATION WITH ISSUES OF LAW

1. Betty L. Tianti is the Connecticut Commissioner of Labor.

2. Acting pursuant to her authority under § 31-68 of the Connecticut General Statutes, a copy of which is attached hereto as Exhibit 1 and incorporated herein by reference, she brought a civil action in the Connecticut Superior Court seeking overtime wages for certain employees of Overnite Transportation Company.

3. Said action was removed to the United States District Court by Overnite Transportation pursuant to this Court's diversity of citizenship jurisdiction as set forth in 28 U.S.C. § 1332.

4. Said action, captioned *Betty L. Tianti, Commissioner of Labor, ex rel. Alexander Arisco, et al. v. Overnite Transportation Co.*, Civil Action No. H-89-56 (AHN), was brought entirely under state law.

5. The Connecticut Labor Commissioner is not basing her claims to collect overtime wages on the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, or any other federal statute or regulation.

6. The individuals named in paragraph 3 of the complaint are "employees" within the meaning of § 31-58(f) of the Connecticut General Statutes, a copy of which is attached hereto as Exhioit 2 and incorporated herein by reference.

7. The employees in paragraph 3 of the complaint are the "dock workers" at Overnite's Wallingford, Connecticut trucking terminal.

8. These "dock workers" fall within the definition of "loader" under the federal regulations, 29 C.F.R. Section 782.5, promulgated pursuant to the Fair Labor Standards Act (F.L.S.A.) exemption in 29 U.S.C. Section 213(b)(1).

9. Overnite's "dock workers" are responsible for loading and unloading trucks which travel in interstate commerce.

10. The work responsibilities of the dock workers are more fully described in Overnite's "Warehouseman's Manual," a copy of which is attached hereto as Exhibit 3 and is incorporated herein by reference, and Overnite's "Hazardous Materials Procedure," a copy of which is attached hereto as Exhibit 4 and is incorporated herein by reference.

11. The dock workers perform all their duties at the trucking terminal.

12. No overtime wages are claimed for, nor are any of the workers on behalf of whom this action is brought responsible for, driving or riding in Overnite's trucks.

13. None of the individuals named in paragraph 3 of the complaint received time-and-a-half for overtime hours worked.

The issues before the Court are:

1. Are Overnite's dock workers exempt from the State of Connecticut's overtime requirements set forth in § 31-76c of the Connecticut General Statutes pursuant to § 31-76i(a)?

2. If Overnite's dock workers are not exempt pursuant to § 31-76i(a), does the United States Fair Labor Standards Act, 29 U.S.C. § 213(b)(1), preempt § 31-76c as it relates to Overnite's dock workers?

BETTY L. TIANTI,
COMMISSIONER OF LABOR
STATE OF CONNECTICUT

CLARINE NARDI RIDDLE
DEPUTY ATTORNEY GENERAL
(ACTING ATTORNEY GENERAL)

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OVERNITE TRANSPORTATION CO.

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Its Attorney

UNITED STATES CONSTITUTION

ARTICLE I

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties; Imposts and Excises shall be uniform throughout the United States;

* * * *

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

ARTICLE VI

* * * *

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

JURISDICTIONAL STATUTES

28 U.S.C.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

FAIR LABOR STANDARDS ACT

29 U.S.C.A.

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 213. Exemptions

(a) The provisions of sections 206 and 207 of this title shall not apply with respect to –

* * * *

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other acquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

* * * *

(b) The provisions of section 207 of this title shall not apply with respect to –

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or

(2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act [49 U.S.C.A. § 1 *et seq.*]; or

(3) any employee of a carrier by air subject to the provisions of the Railway Labor Act [45 U.S.C.A. § 181 *et seq.*]; or

(4) Repealed. Pub.L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman;

HOURS OF SERVICE ACT

45 U.S.C.A.

§ 61. Carriers subject to provisions of this chapter; definitions; time on duty

(a) This chapter shall apply to any railroad.

(b) For the purposes of this chapter –

(1) The term "railroad" shall have the same meaning as when used in the Federal Railroad Safety Act of 1970 (45 U.S.C. 431 *et seq.*).

(2) The term "employee" means an individual actually engaged in or connected with the movement of any train, including hostlers.

(3) Time on duty shall commence when an employee reports for duty and terminate when the employee is finally released from duty, and shall include:

(A) Interim periods available for rest at other than a designated terminal;

(B) Interim periods available for less than four hours rest at a designated terminal;

(C) Time spent in deadhead transportation by an employee to a duty assignment: *Provided,* That time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty;

(D) The time an employee is actually engaged in or connected with the movement of any train; and

(E) Such period of time as is otherwise provided by this chapter.

(4) The term "designated terminal" means the home terminal and the away from home terminal for the assignment of a particular crew. Time on duty shall not include interim rest periods of four or more hours between designated terminals where the employee is prevented from reaching his or her designated terminal by act of God, track obstruction, casualty, derailment or major disabling equipment failure, which derailment or disabling equipment failure was the result of a cause not known to the railroad or its officer or agent in charge of the employee at the time such employee left the designated terminal, and which could not have been foreseen, and only then at a place where suitable facilities for food and lodging are available.

§ 62. Employees' hours of service

(a) Limitations

It shall be unlawful for any railroad, its officers or agents, subject to this chapter –

(1) to require or permit an employee, in case such employee shall have been continuously on duty for fourteen hours, to continue on duty or to go on duty until he has had at least ten consecutive hours off duty, except that, effective upon the expiration of the two-year period beginning on the effective date of this paragraph, such fourteen-hour duty period shall be reduced to twelve hours;

(2) to require or permit an employee to continue on duty or to go on duty when he has not had at least eight consecutive hours off duty during the preceding twenty-four hours;

(3) to provide sleeping quarters for employees (including crew quarters, camp or bunk cars, and trailers) which do not afford such employees an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters; or

(4) to begin construction or reconstruction of any sleeping quarters referred to in paragraph (3), on or after July 8, 1976, within or in the immediate vicinity (as determined in accordance with rules prescribed by the Secretary) of any area where railroad switching or humping operations are performed.

(b) Determination of service

In determining, for the purposes of subsection (a) of this section, the number of hours an employee is on duty, there shall be counted, in addition to the time such employee is actually engaged in or connected with the movement of any train, all time on duty in other service performed for the railroad during the twenty-four-hour period involved.

(c) Crew of wreck or relief trains; emergencies; additional duty

Notwithstanding subsection (a) of this section, the crew of a wreck or relief train may be permitted to be or remain on duty for not to exceed 4 additional hours in any period of 24 consecutive hours whenever an actual emergency exists and work of the crew is related to such emergency. For purposes of this subsection, an emergency ceases to exist when the track is cleared and the line is open for traffic.

(d) Applicability

The provisions of this section shall not apply to an employee during such period of time as the provisions of section 63 of this title apply to his duty and off-duty periods.

(e) "Employees" defined

As used in subsection (a)(3) of this section, the term "employees" shall include an individual employed for the purpose of maintaining the right-of-way of any railroad.

§ 63. Dispatcher's hours of service

(a) Limitations

No operator, train dispatcher, or other employee who by the use of the telegraph, telephone, radio, or any other electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements –

(1) shall be required or permitted to be or remain on duty for more than nine hours, whether consecutive or in the aggregate, in any twenty-four-hour period in any tower, office, station, or place where two or more shifts are employed; and

(2) shall be required or permitted to be or remain on duty for more than twelve hours, whether consecutive or in the aggregate, in any twenty-four-hour period in any tower, office, station, or place where only one shift is employed.

(b) Determination of service

For the purposes of subsection (a) of this section, in determining the number of hours an employee is on duty in a class of service, and at a place, described in paragraph (1) or (2) of such subsection, there shall be counted, in addition to the time spent by him on duty in such service at such place, all time on duty in other service performed for the railroad during the twenty-four-hour period involved.

(c) Emergency service

Notwithstanding subsection (a) of this section, in case of emergency the employees named in such subsection may be permitted to be and remain on duty for four additional hours in any period of twenty-four consecutive hours of not exceeding three days in any period of seven consecutive days

§ 63a. Signal system employees' hours of service

(a) Limitations

It shall be unlawful for any railroad, its officers or agents, subject to this chapter –

(1) to require or permit an individual employed by the railroad who is engaged in installing, repairing or maintaining signal systems, in case such individual shall have been continuously on duty for twelve hours, to continue on duty or to go on duty until he has had at least ten consecutive hours off duty; or

(2) to require or permit an individual described in paragraph (1) to continue on duty or to go on duty when he has not had at least eight consecutive hours off duty during the preceding twenty-four hours.

Whenever the time on duty of an individual is broken or interrupted by any period of time off duty of less than eight consecutive hours, such individual may be on duty for not more than twelve hours during a twenty-four-hour period, if such individual has had at least eight consecutive hours off duty immediately before reporting for duty, or, where required by paragraph (1) of this subsection, at least ten consecutive hours off duty immediately before so reporting. After an individual has been on duty for a total of twelve hours during a period of twenty-four hours as permitted by the foregoing sentence, or at the end of such twenty-four-hour period, whichever occurs first, such individual shall not be required or permitted to continue on duty or to go on duty until he has had at least eight consecutive hours off duty. For purposes of this subsection, a twenty-four-hour period shall begin when an individual reports for duty immediately after he has had at least eight consecutive hours off duty or, where required by paragraph (1) of this subsection, at least ten consecutive hours off duty.

(b) Determination of service

In determining for the purposes of subsection (a) of this section the number of hours an individual is on duty, there shall be counted, in addition to the time such individual is actually engaged in installing, repairing or maintaining signal systems, all time on duty in other service performed for the railroad during the twenty-four-hour period involved.

(c) Time on duty

For purposes of this section, time on duty shall commence when an individual reports for duty and terminate when an individual is finally released from duty, except that –

(1) time spent in travel on return from a trouble call, whether directly to the individual's residence or by way of the individual's headquarters, shall be considered neither time on duty nor time off.

(d) "Employee" defined

As used in sections 62(a)(3), 64, and 64a of this title, the term "employee" shall be deemed to include an individual employed by the railroad who is engaged in installing, repairing or maintaining signal systems.

(e) Applicability

The provisions of this section shall not apply to an individual during such period of time as the provisions of section 63 of this title apply to his duty and off-duty periods.

(f) Emergency service

Notwithstanding subsection (a) of this section, an individual engaged in installing, repairing, or maintaining signal systems may be permitted to be or remain on duty for not to exceed four additional hours in any period of twenty-four consecutive hours whenever an actual emergency exists and work of the

individual is related to such emergency. For purposes of this subsection with respect to the on-duty time of an individual engaged in installing, repairing, or maintaining signal systems, an emergency ceases to exist when the signal systems are restored to service.

§ 64. Maximum hours of service; shorter periods permissible

The requirements imposed by this chapter with respect to time on duty of employees are hereby declared to result in the maximum permissible hours of service consistent with safety. However, shorter hours of service and time on duty of employees for lesser periods of time are hereby declared to be proper subjects for collective bargaining between any railroad subject to this chapter and its employees.

§ 64a. Manner of enforcement of this chapter

(a) Penalty; suits therefor; statute of limitations

(1) Any person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) that requires or permits any employee to go, be, or remain on duty in violation of section 62, section 63, or section 63a of this title, or that violates any other provision of this chapter, shall be liable for a penalty of up to $1,000 per violation, as the Secretary of Transportation deems reasonable, except that a penalty may be assessed against an individual only for a willful violation. Such penalty shall be assessed by the Secretary of Transportation and, where compromise is not reached by the Secretary under the Federal Claims Collection Act of 1966, recovered in a suit or suits to be brought by the United States attorney for the judicial district in which the violation occurred, in which the individual defendant resides, or in which the defendant has its principal executive office. It shall be the duty of the United States

attorney to bring such an action upon satisfactory information being lodged with him. In the case of a violation of section 62(a)(3) or (a)(4) of this title, each day a facility is in noncompliance shall constitute a separate offense. For purposes of this section, an act by an individual that causes a railroad to be in violation of this chapter shall be deemed a violation, and an individual shall be deemed not to have committed a willful violation where such individual has acted pursuant to the direct order of a railroad official or supervisor under protest communicated to the supervisor. Such individual shall have the right to document such protest.

(2) No action may be brought under this section after the expiration of the two-year period beginning on the date the violation occurred unless administrative notification pursuant to sections 3711 and 3716 to 3718 of Title 31 has been provided to such person within such two-year period, but in no event may any such action be brought after the expiration of the period specified in section 2462 of Title 28.

(b) Duty of Secretary of Transportation

It shall be the duty of the Secretary of Transportation to lodge with the appropriate United States attorney information of any violation as may come to the knowledge of the Secretary.

(c) Knowledge imputed to carrier

In all prosecutions under this chapter the railroad shall be deemed to have knowledge of all acts of all its officers and agents.

(d) Exceptions from operation

The provisions of this chapter shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the railroad

or its officer or agent in charge of the employee at the time said employee left a terminal, and which could not have been foreseen.

(e) Railroads with not more than fifteen employees; exceptions in public interest; review

With respect to any railroad which employs a total of not more than 15 employees covered by this chapter, the Secretary of Transportation may after full hearing in any particular case and for good cause shown exempt any such railroad subject to this chapter with respect to one or more of its employees from the limitations imposed by this chapter for a specified period of time, if the Secretary of Transportation finds that such exemption is in the public interest and will not adversely affect safety. Such order is to be subject to review at least annually. In no event shall any such exemption be made for any railroad described in this section to work its employees beyond 16 hours either consecutively or in the aggregate within any 24-hour period.

§ 64b. Enforcement by Secretary of Transportation

It shall be the duty of the Secretary of Transportation to carry out the provisions of this chapter.

§ 65. Establishment of eight-hour day

Eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of subtitle IV of Title 49, and who are now or may hereafter be actually engaged

in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States: *Provided*, That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants.

§ 66. Penalty for violation

Any person violating any provision of section 65 of this title shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both.

MOTOR CARRIER ACT

49 U.S.C.A.

§ 3101. Definitions

In this chapter –

(1) "migrant worker" means an individual going to or from employment in agriculture as defined in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g) or section 203(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f).)

(2) "motor carrier", "motor common carrier", "motor private carrier", "motor vehicle", and "United States" have the same meanings given those terms in section 10102 of this title.

(3) "motor carrier of migrant workers" means a person (except a motor common carrier) providing transportation referred to in section 10521(a) of this title by a motor vehicle (except a passenger automobile or station wagon) for at least 3 migrant workers at a time to or from their employment, but the term does not include a migrant worker providing transportation for migrant workers and their immediate familiies.

(Added Pub.L. 97-449, Jan. 12, 1983, 96 Stat. 2438.)

§ 3102. Requirements for qualifications, hours of service, safety, and equipment standards

(a) This section applies to transportation –

(1) described in sections 10521 and 10522 of this title; and

(2) to the extent the transportation is in the United States and is between places in a foreign country, or between a place in a foreign country and a place in another foreign country.

(b) The Secretary of Transportation may prescribe requirements for –

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

(c) The Secretary may prescribe requirements for the comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment of a motor carrier of migrant workers. The requirements only apply to a carrier transporting a migrant worker –

(1) at least 75 miles; and

(2) across the boundary of a State, territory, or possession of the United States.

(d) Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of such requirement.

(Added Pub.L. 97-449, Jan. 12, 1983, 96 Stat. 2438, and amended Pub.L. 98-544, Title II, § 206(h), Oct. 30, 1984, 98 Stat. 2835.)

§ 3103. Research, investigation, and testing

(a) The Secretary of Transportation may investigate and report on the need for Federal regulation of sizes, weight, and combinations of motor vehicles and qualifications and max-

imum hours of service of employees of a motor carrier subject to subchapter II of chapter 105 of this title and a motor private carrier. The Secretary shall use the services of each department, agency, or instrumentality of the United States Government and each organization of motor carriers having special knowledge of a matter being investigated.

(b) In carrying out this chapter, the Secretary may use the services of a department, agency, or instrumentality of the Government having special knowledge about safety, to conduct scientific and technical research, investigation, and testing when necessary to promote safety of operation and equipment of motor vehicles. The Secretary may reimburse the department, agency, or instrumentality for the services provided.

(Added Pub.L. 97-449, Jan. 12, 1983, 96 Stat. 2439.)

§ 3104. Identification of motor vehicles

(a) The Secretary of Transportation may –

(1) issue and require the display of an identification plate on a motor vehicle used in transportation provided by a motor private carrier and a motor carrier of migrant workers subject to section 3102(c) of this title (except a motor contract carrier); and

(2) require each of those motor private carriers and motor carriers of migrant workers to pay the reasonable cost of the plate.

(b) A motor private carrier or a motor carrier of migrant workers may use an identification plate only as authorized by the Secretary.

(Added Pub.L. 97-449, Jan. 12, 1983, 96 Stat. 2439.)

§ 10521. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier –

(1) between a place in –

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not –

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-296, § 31(b), July 1, 1980, 94 Stat. 824; Pub.L. 97-261, § 6(f), Sept. 20, 1982, 96 Stat. 1107; Pub.L. 99-521, § 6(a), Oct. 22, 1986, 100 Stat. 2994.)

CONNECTICUT WAGE AND HOUR ACT

Sec. 31-76a. Investigations on complaint of nonpayment of wages.

On receipt of a complaint for nonpayment of wages, the labor commissioner, the director of minimum wage and wage enforcement agents of the labor department shall have power to enter, during usual business hours, the place of business or employment of any employer to determine compliance with the wage payment laws, and for such purpose may examine payroll and other records and interview employees, call hearings, administer oaths, take testimony under oath and take depositions in the manner provided by section 52-148a to 52-148e, inclusive. The commissioner or the director, for such purpose, may issue subpoenas for the attendance of witnesses and the production of books and records. Any employer, his officer or agent, or the officer or agent of any corporation, firm or partnership who wilfully fails to furnish time and wage records as required by law to the commissioner, the director of minimum wage or any wage enforcement agent upon request or who refuses to admit the commissioner, the director or such agent to his place of employment or who hinders or delays the commissioner, the director or such agent to his place of employment or who hinders or delays the commissioner, the director or such agent in the performance of his duties in the enforcement of this section shall be fined not less than twenty-five dollars nor more than one hundred dollars, and each day of such failure to furnish the time and wage records to the commissioner, the director or such agent shall constitute a separate offense, and each day of refusal to admit, of hindering or of delaying the commissioner, the director or such agent shall constitute a separate offense.

Sec. 31-76b. Overtime pay: Definitions. As used in sections 31-76b to 31-76j, inclusive:

(1) The "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include (A) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency; (B) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; (C) sums paid in recognition of services performed during a given period if either, (i) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement or promise causing the employee to expect such payments regularly; (ii) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the approval of the labor commissioner who shall give due regard, among other relevant factors, to the extent to which the amounts paid to the employee are determined with regard to hours of work, production or efficiency; (D) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident or health insurance or similar benefits for employees; (E) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under section 31-76c, or in excess of the employee's normal working hours or regular

working hours, as the case may be; (F) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or (G) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal or regular workday, not exceeding the maximum workweek applicable to such employee under section 31-76c, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek;

(2) (A) "Hours worked" include all time during which an employee is required by the employer to be on the employer's premises or to be on duty, or to be at the prescribed work place, and all time during which an employee is employed or permitted to work, whether or not required to do so, provided time allowed for meals shall be excluded unless the employee is required or permitted to work. Such time includes, but shall not be limited to, the time when an employee is required to wait on the premises while no work is provided by the employer. (B) All time during which an employee is required to be on call for emergency service at a location designated by the employer shall be considered to be working time and shall be paid for as such, whether or not the employee is actually called upon to work. (C) When an employee is subject to call for emergency service but is not required to be at a location designated by the employer but is simply required to keep the employer informed as to the location at which he may

be contacted, or when an employee is not specifically required by his employer to be subject to call but is contacted by his employer or on the employer's authorization directly or indirectly and assigned to duty, working time shall begin when the employee is notified of his assignment and shall end when the employee has completed his assignment;

(3) "Employee" means employee as defined in section 31-58.

Sec. 31-76c. Length of workweek. No employer, except as otherwise provided herein, shall employ any of his employees for a workweek longer than forty hours, unless such employee receives remuneration for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

Sec. 31-76e. Maximum workweek under contract or collective bargaining agreement. No employer shall be deemed to have violated section 31-76c by employing any employee for a workweek in excess of the maximum workweek applicable to such employee if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (j) of section 31-58 and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

* * * *

Sec. 31-76i. Exceptions. The provisions of sections 31-76b to 31-76j, inclusive, shall not apply with respect to (a) any driver or helper, excluding drivers or helpers employed by exempt employers, with respect to whom the Interstate Commerce Commission or the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of applicable federal law or regulation of any employee of a carrier by air subject to the Railway Labor Act or any employee of any employer subject to said Railway Labor Act; (b) any employee employed as a seaman; (c) any employee employed as an announcer, a news editor or chief engineer by a radio station or television station; (d) repealed by 1972, P.A. 116, S. 3, 6; (e) any person employed in a bona fide executive, administrative or professional capacity as defined in the regulations of the labor commissioner issued pursuant to section 31-60; (f) any person employed in the capacity of outside salesman as defined in the regulations of the Federal Fair Labor Standards Act; (g) any inside salesperson whose sole duty is to sell a product or service (1) whose regular rate of pay is in excess of two times the minimum hourly rate applicable to him under section 31-58, (2) more than half of whose compensation for a representative period, being not less than one month, represents commissions on goods or services, and (3) who does not work more than fifty-four hours during a work week of seven consecutive calendar days. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee; (h) any person employed as a taxicab driver by any employer engaged in the business of operating a taxicab, if such driver is paid forty per cent or more of the fares recorded on the meter of the taxicab operated by him; (i) any person employed in the capacity of a household delivery route salesman engaged in delivering milk or bakery products to consumers and who is paid on a commission basis as defined in the regulations of the labor commissioner issued pursuant to section

31-60; (j) any salesman primarily engaged in selling automobiles; (k) any person employed in agriculture; (l) any permanent paid members of the uniformed police force of municipalities and permanent paid members of the uniformed fire fighters of municipalities; (m) any person employed as a fire fighter by a private nonprofit corporation which on May 24, 1984, has a valid contract with any municipality to extinguish fires and protect its inhabitants from loss by fire; (n) any person, except a person paid on an hourly basis, employed as a beer delivery truck driver by a licensed distributor, as defined by section 12-433; or (o) any person employed as a mechanic primarily engaged in the servicing of motor vehicles, as defined in section 14-1, or farm implements, as defined in section 14-1, by a nonmanufacturing employer primarily engaged in the business of selling such vehicles or implements to consumers, to the extent that such employees are exempt under the federal Wage-Hour and Equal Pay Act, 29 U.S.C. 201 *et seq.* and 29 U.S.C. 213(b)(10), provided such person's actual weekly earnings exceed an amount equal to the total of (1) such person's basic contractual hourly rate of pay times the number of hours such person has actually worked plus (2) such person's basic contractual hourly rate of pay times one-half the number of hours such person has actually worked in excess of forty hours in such week. For the purposes of this section, "basic contractual hourly rate" means the compensation payable to a person at an hourly rate separate from and exclusive of any flat rate, incentive rate or any other basis of calculation.

* * * *

IDAHO CODE 44-1502 (1990)

§ 44-1502. Minimum wages and overtime pay

* * * *

(3) Except as hereinafter otherwise provided in the case of overtime pay only and subject to the same exceptions and/or exceptions for overtime as provided now or hereafter under the federal Fair Labor Standards Act; i.e., those employers not exempted or excepted by the overtime provisions of the federal Fair Labor Standards Act shall pay overtime as provided in this section, no employer shall employ any employee longer than forty (40) hours in a workweek consisting of seven (7) consecutive twenty-four (24) hour periods unless such employee receives compensation for employment in excess of forty (40) hours at a rate of not less than one and one-half (1½) times the employee's regular rate of pay.

MONT. CODE ANNO., § 39-3-406 (1990)

* * * *

(2) The provisions of 39-3-405 do not apply to:

(a) an employee with respect to whom the United states Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of 49 U.S.C. 304.

NEV. REV. STAT. ANN. § 608.018

§ 608.018. Compensation for overtime: Requirement; exceptions.

(1) Except as provided in subsection 2, an employer shall pay one and one-half times an employee's regular wage rate whenever an employee works:

(a) More than 40 hours in any scheduled week of work; or

(b) More than 8 hours in any workday unless by mutual agreement employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

(2) The provisions of subsection 1 do not apply to:

* * * *

(g) Drivers, drivers' helpers, loaders and mechanics for motor carriers subject to the Motor Carrier Act of 1935, as amended.

WASHINGTON REVISED CODE

CHAPTER 49.46

MINIMUM WAGE ACT

49.46.010. Definitions

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by regulations of the director;

(3) "Employ" includes to permit to work;

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

(5) "Employer" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman as those terms are defined and delimited by regulations of the director. However, those terms shall be defined and delimited by the state personnel board pursuant to chapter 41.06 RCW and the higher education personnel board pursuant to chapter 28B.16 RCW for employees employed under their respective jurisdictions;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor or carrier;

(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;[8]

(h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel.

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[8] 49 U.S.C.A. § 1 *et seq.* (repealed; see, now, 49 U.S.C.A. § 101 *et seq.*

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed.

(Enacted by Laws 1959, ch. 294, § 1. Amended by Laws 1961, Ex.Sess., ch. 18, § 2; Laws 1974, Ex.Sess., ch. 107, § 12; Laws 1975, 1st Ex.Sess., ch. 289, § 1, Sept. 1, 1975; Laws 1977, Ex.Sess., ch. 69, § 1, eff. May 24, 1977; Laws 1984, ch. 7, § 364; Laws 1989, ch. 1, § 1, eff. Jan. 1, 1989 (Initiative Measure No. 518, approved Nov. 8, 1988)).

49.46.130. Minimum rate of compensation for employment in excess of forty-hour work week – Exceptions

(1) No employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed, except that the provisions of this subsection (1) shall not apply to any person exempted pursuant to RCW 49.46.010(5) as now or hereafter amended and the provision of this subsection shall not apply to employees who request compensating time off in lieu of overtime pay nor to any individual employed as a seaman whether or not the seaman is employed on a vessel other than an American vessel, nor to seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days a year, nor to any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay, nor to

an individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 *et seq.* and 49 U.S.C. Sec. 10101 *et seq.*), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.

(2) No public agency shall be deemed to have violated subsection (1) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if: (a) In a work period of twenty-eight consecutive days the employee receives for tours of duty which in the aggregate exceed two hundred and forty hours; or (b) in the case of such an employee to whom a work period of at least seven but less than twenty-eight days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as two hundred forty hours bears to twenty-eight days; compensation at a rate not less than one and one-half times the regular rate at which he is employed: *Provided,* That this section shall not apply to any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in

connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption: *Provided further,* That in any industry in which federal law provides for an overtime payment based on a work week other than forty hours then provisions of this section shall not apply; however the provisions of the federal law regarding overtime payment based on a work week other than forty hours shall nevertheless apply to employees covered by this section without regard to the existence of actual federal jurisdiction over the industrial activity of the particular employer within this state: *Provided further,* That "industry" as that term is used in this section shall mean a trade, business, industry, or other activity, or branch, or group thereof, in which individuals are gainfully employed (section 3(h) of the Fair Labor Standards Act of 1938, as amended (Public Law 93-259)).[9]

(Enacted by Laws 1975, 1st Ex.Sess., ch. 289, § 3, eff. Sept. 1, 1975. Amended by Laws 1977, Ex.Sess., ch. 4, § 1; Laws 1977, Ex.Sess., ch. 74, § 1. Re-enacted and amended by Laws 1989, ch. 104, § 1.)

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[9] 29 U.S.C.A. § 203(h).

CALIFORNIA CODE OF REGULATIONS

8 Cal. Code Reg. § 11090 (1991)

§ 11090. Order Regulating Wages, Hours, and Working Conditions in the Transportation Industry

(1) Applicability of Order. This Order shall apply to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis, except that:

* * * *

(H) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers.

OR. ADMIN. REG. 839-20-125(3)(a)(1991)

OREGON ADMINISTRATIVE RULES

CHAPTER 839, DIVISION 20 – BUREAU OF LABOR AND INDUSTRIES

Exemptions from Overtime

Overtime Exemptions Pertaining to Employers Regulated under the Federal Fair Labor Standards Act

839-20-125 (1) This rule applies to employers and employees newly subject to OAR 839-20-030, Overtime Generally, by virtue of the repeal of ORS 653.020(7) by 1989 Oregon Laws, Chapter 446, Section 2.

* * * *

(3) The provision of OAR 839-20-030 do not apply when the provisions of section 13(b), of the Fair Labor Standards Act apply to employees as follows:

(a) Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or

* * * *

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

No. 91-21

In The

Supreme Court of the United States

October Term, 1991

OVERNITE TRANSPORTATION CO.,

Petitioner,

v.

BETTY L. TIANTI, COMMISSIONER OF LABOR OF THE STATE OF CONNECTICUT,

Respondent.

Petition For A Writ Of Certiorari To The Second Circuit Court Of Appeals

BRIEF OF THE RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Overnite Transportation Company (hereinafter "Overnite") has brought a petition for a writ of certiorari asking this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit which held that the dock workers employed at Overnite's Wallingford, Connecticut trucking terminal were not exempt from Connecticut's overtime statutes and further that the State of Connecticut was not preempted by federal statutes from requiring Overnite to pay overtime to those employees. *See* Appendix attached to Overnite's Petition (hereinafter "App.") pp. 1a-6a. This judgment and opinion affirmed in all respects the decision of the United States District Court for the District of Connecticut granting summary judgment in favor of Betty L. Tianti,[1] former Commissioner of Labor of the State of Connecticut (hereinafter "Commissioner") in the two consolidated actions. App., pp. 7a-16a.

The sole claim upon which Overnite seeks this Court's review is the preemption question. Petition, pp. 1-2. Specifically, Overnite urges this Court to find that Connecticut General Statutes § 31-76c is violative of the United States Constitution's Commerce and Supremacy Clauses, Article I, Section 8 and Article VI, as it applies to these dock workers. Section 31-76c provides:

> No employer, except as otherwise provided herein, shall employ any of his employees for a work week longer than forty hours, unless such

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[1] On February 1, 1991, Ronald F. Petronella became Commissioner of Labor.

> employee receives remuneration for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

App., p. 43a.

The District Court awarded to the Commissioner the sum of $27,322.72 in unpaid overtime wages and $3,414.34 in prejudgment interest, for a total amount of $30,738.36. App., p. 8a. The District Court held that the employees involved, who loaded trucks on the premises of Overnite's Wallingford, Connecticut terminal, were not exempt from the overtime requirements under § 31-76i (a) of the Connecticut General Statutes. App., p. 14a. The District Court further held that the State of Connecticut was not preempted by federal law, either in the Fair Labor Standards Act (hereinafter "FLSA") or the Motor Carrier Act (hereinafter "MCA") from requiring overtime wages for those workers. App., p. 16a.

Overnite claims that § 31-76c is preempted by the MCA, 49 U.S.C. §§ 3101 through 3104, and the FLSA, 29 U.S.C. §§ 201 through 219. No particular language in any statute is claimed to preempt state overtime wage regulation. Rather, Overnite claims that three decisions of this Court mandate a finding of preemption in this case: *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Levinson v. Spector Motor Service,* 330 U.S. 649 (1947); and *Southland Gasoline Co. v. Bayley,* 319 U.S. 44 (1943).

The employees in this case are exempt from the overtime requirements of the FLSA pursuant to 29 U.S.C. § 213 (b)(1) and its corresponding regulation found in 29

C.F.R. § 782.5 in that they are "loaders." *See* Stipulation, paragraph 8, App., p. 18a.

The Respondent Commissioner submits, and the Second Circuit and District Court so found, that the MCA does not prohibit and the FLSA specifically permits states to require overtime pay for federally exempted workers. Title 29 U.S.C. § 218 (a) provides in relevant part:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter. . . .

Respondent's Appendix, p. A1.

ARGUMENT

I. DECISION OF THE SECOND CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT IN *LEVINSON V. SPECTOR MOTOR SERVICE,* 330 U.S. 649 (1947); *SOUTHLAND GASOLINE CO. V. BAYLEY,* 319 U.S. 44 (1943); AND *CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.,* 411 U.S. 624 (1973).

Four Circuit Courts of Appeals have considered the issue raised here and have concluded that federal law does not preempt state and local governments from requiring overtime pay for workers exempt under federal

law.[2] *Agsalud v. Pony Express Courier Corp. of America*, 833 F.2d 809 (9th Cir. 1987); *Pettis Moving Co. v. Roberts*, 784 F.2d 439 (2d Cir. 1986); *Central Delivery Service v. Burch*, 486 F.2d 1399 (4th Cir. 1973), *mem. aff'g* 355 F. Supp. 954 (D. Md.); and *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258 (D.C. Cir. 1972).

This uniformity by the Circuits is not surprising because the purported conflict with Supreme Court precedents, which the petitioner seeks to establish, is illusory. The claimed conflict with the three decisions of this Court cannot be sustained. None of the cases relied on concerned state regulation of overtime wages. Two cases concerned the FLSA exemption pursuant to § 213 (b)(1). The third case did not involve wages under the FLSA or the MCA.

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[2] The decision in this case was the second time the issue was before the Second Circuit. The Ninth Circuit also reached a similar result under another exemption in *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990), holding that California could require overtime pay for seamen exempt under § 213 (b)(6) of the FLSA.

In addition, it is noted that two state Supreme Courts have reached the same conclusion on the preemption issue. *Plouffe v. Farm and Ranch Equipment Co.*, 174 Mont. 313, 570 P.2d 1106 (1977), held that the FLSA exemption in 29 U.S.C. § 213 (b)(10)(A) did not preempt Montana from requiring overtime pay for a farm equipment mechanic. In *Dept. of Labor & Industries of the State of Washington v. Common Carriers, Inc.*, 111 Wash.2d 586, 762 P.2d 348 (1988), the Washington Supreme Court sitting *en banc* held that the state was not preempted by the MCA from requiring overtime pay for a truck mechanic employed by an interstate carrier.

In *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943), the Court resolved a conflict of authority between the Fourth and Eighth Circuit Courts of Appeals on the issue of whether the exemption in § 213 (b)(1) of the FLSA applied to employees of private carriers of property over whom the Interstate Commerce Commission ("ICC") had authority, even though it had not actually been exercised. The Court concluded that the existence of the authority was sufficient. *Id.* at 47-48. The Court stated with regard to the interplay between the MCA and the FLSA: "The amendment [§ 213 (b)(1)] was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers." *Id.* at 48-49. Nothing in the case dealt with preemption of any state regulation of overtime.

In *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947), this Court affirmed the decision of the Supreme Court of Illinois and held that the ICC had the power to regulate employees who did not perform exempt duties during all their working hours. In that case, the workers spent part of their time as loaders and part of their time as "checkers" or "foremen." The Court held that the worker's activities:

> affected the safety of operation, although it does not appear what fraction of his time was spent in activities affecting safety of operation. As a consequence, he comes within the power of the Commission to establish qualifications and maximum hours of service with respect to him and, by the express terms of § 13 (b)(1) of the Fair Labor Standards Act, he is excluded, automatically, from the benefits of § 7 of that Act.

Id. at 681. Any worker subject to the MCA is, therefore, exempt from the FLSA. Nowhere did the Court mention state regulation of overtime or preemption.

In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the Court considered whether a city ordinance prohibiting jet aircraft from taking off between 11:00 p.m. and 7:00 a.m. from the local airport violated the Federal Aviation Act and the Noise Control Act. In affirming the District Court's and the Ninth Circuit's findings of preemption, the Supreme Court held that: "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." *Id.* at 633. The Court also stated:

> Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question.

Id. at 638.

It is clear from a review of the cases cited by Overnite that the Second Circuit's decision does not, as claimed by petitioner, conflict with the holdings of *Southland Gasoline, Levinson* and *City of Burbank*. Moreover, these cases are devoid of any dicta to support petitioner's position.

II. THE MOTOR CARRIER ACT DOES NOT PREEMPT CONNECTICUT'S WAGE AND HOUR ACT, AS APPLIED TO OVERNITE'S LOADING DOCK WORKERS.

The sole case decided by this Court concerning preemption of state law by the MCA is *California v. Zook*, 336

U.S. 725 (1949). In that case, this Court decided that the State of California could make it unlawful to sell or arrange for interstate transportation of persons over public highways by a carrier without a permit from the ICC. The Court found nothing in the language of the MCA or its legislative history to directly answer the preemption question, except "an expression of deference to State action on intrastate commerce." *Id.* at 733 fn. 9. In the absence of a conflict between the state and federal statutes, there was no reason to "justify the thwarting of state regulation." *Id.* at 733. The Court also stated that such questions "can be resolved only by careful scrutiny of the activity regulated." *Id.* at 734. The interpretation of 49 U.S.C. § 302 (b) [now 49 U.S.C. § 10521 (b)] in the footnote *supra*, p. 733 indicates that the states are not limited to regulating intrastate transportation and the payment of taxes as claimed in Overnite's statutory interpretation analysis of § 10521 (b) at pages 11 and 25 of its petition.[3]

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[3] Petitioner Overnite did not raise this statute, 49 U.S.C. § 10521 (b), as a source of preemptive language or as a limit to state authority over motor carrier workers until this petition was filed. *See* Stipulation with Issues of Law, App., pp. 17a-19a, as well as the decisions of the Second Circuit, App., pp. 1a-6a, and the District Court, App., pp. 14a-16a. Overnite's preemption claim throughout this litigation has been based on the premise, as stipulated by the parties, that the FLSA § 213 (b)(1) preempts state regulation of overtime in § 31-76c of the Connecticut General Statutes. The issue that Overnite raises for the first time in its petition seeking this Court's review, *i.e.*, that 49 U.S.C. § 10521 (b) expresses a Congressional intent to limit states to taxation and intrastate transportation, was never articulated to the lower courts. In the light of the precedent of this Court in *California v. Zook*, 336 U.S. 725 (1949), however, the argument has no validity.

None of the cases cited by Overnite pertain to an analysis of the MCA. Moreover, there is simply no conflict between the Connecticut statute and the MCA.

The MCA provides for regulation by the Secretary of Transportation of the maximum hours and qualifications of drivers, drivers' helpers, loaders and mechanics employed by interstate motor carriers. The Respondent Commissioner does not regulate the qualifications or set maximum hours of the dock workers in this case. The Connecticut statute (§ 31-76c) at issue, simply requires that all employees be paid time and one-half for all hours worked over 40 in a week.

As stated by the District Court in this case:

> A state's traditional police powers, such as are involved in Connecticut's regulation of overtime wages, are not preempted by federal law unless preemption "was the clear and manifest purpose of Congress." Ray v. Atlantic Richfield, 435 U.S. 151, 157 (1978) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

App., p. 14a.[4]

In *Pierce v. Cook & Co.*, 437 F.2d 1119, 1126 (10th Cir. 1970), the Tenth Circuit Court of Appeals held that state law was not preempted by the MCA and stated that:

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[4] Contrary to any implications that can be drawn from statements at pages 25-26 of Overnite's petition, *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978), did not involve the MCA. Rather, the issue was whether the State of Washington's Tanker Law was preempted by the federal Ports and Waterways Safety Act of 1972.

> There is no language in the Motor Carrier Act indicating any intent of Congress to supersede state tort law with respect to negligence or wrongful death liability of a shipper. Hence, state law governs with respect to Cook's liability in the instant case.

Id. Overnite has cited no case which held that § 10521 (b) specifically, or the MCA generally, sets limits on the authority of states to regulate commerce.

This Court has recognized and recently affirmed the view that: "The States have traditionally regulated the payment of wages, including vacation pay." *Massachusetts v. Morash*, 490 U.S. 107, 119 (1989).[5] In rejecting the pre-emption claim raised in that case, this Court stated:

> Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with "the separate spheres of governmental authority presented in our federalist system."

Id. See also the case quoted therein: *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 19 (1987).

Overnite has failed to show any conflict between its compliance with both the MCA and the Connecticut overtime statute. As admitted by Overnite at pages 24-25 of its petition, there is no express language in the MCA

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[5] In *Massachusetts v. Morash*, 490 U.S. 107 (1989), the defendant employer was charged with a criminal violation of the Massachusetts wage payment statute. The employer claimed that its policy of paying unused vacation time to discharged employees was an "employee welfare benefit plan" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002 (1), and, therefore, that state criminal action to enforce the policy was preempted.

preempting state laws regulating overtime. There is, however, as noted by the courts which have considered the issue, a federal statute, § 218 (a) of FLSA, which specifically allows the states to set more stringent overtime standards than the federal. While Overnite claims that § 218 (a) does not apply to FLSA exempt workers, it has no legislative history or case law to cite in support of that theory.

The fallacy of Overnite's argument is illustrated in *Williams v. W.M.A. Transit Company,* 472 F.2d 1258 (D.C. Cir. 1972). In that case, the District of Columbia Circuit Court of Appeals interpreted the District of Columbia Minimum Wage Act of 1966, an Act of Congress for the local governance of the District of Columbia. The Act did not contain an exemption for bus drivers, who are exempt as drivers under § 213 (b)(1) of the FLSA. The Court concluded that Congress' omission of the exemption in the District of Columbia Act taken together with § 218 (a) of the FLSA permitting more liberal state and local benefits to employees demonstrated a Congressional intent that the drivers be covered by the District overtime requirement. *Id.* at 1263.

The language in *Levinson v. Spector Motor Service,* 330 U.S. 649, 661-662 (1947), quoted in Overnite's petition at pp. 19-20, is fully supportive of the lower courts' rulings here:

> There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in § 7 of the Fair Labor

> Standards Act. Such overlapping, however, has not been authorized by Congress [footnote omitted] and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act.

The "overlapping" referred to is that of the "jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service." *Id.* at 661.

Congress has failed to expressly preempt state overtime regulation in the MCA. Congress has expressly allowed the District of Columbia and the states and municipalities to have more stringent overtime standards in § 218 (a) of the FLSA. The cases cited by Overnite involve matters other than wages and statutes other than the MCA. All of the cases which have considered the specific issue involved in this petition have been decided in favor of the Respondent Commissioner's position, as did the District Court and the Second Circuit Court of Appeals in this case. As was the case with the District of Columbia, the State of Connecticut similarly is not prohibited, therefore, from requiring Overnite to pay its loaders overtime.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this matter should be denied.

Respectfully submitted,

Respondent
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No. 91-21

In The

Supreme Court of the United States

October Term, 1991

OVERNITE TRANSPORTATION CO.,

Petitioner,

v.

BETTY L. TIANTI, COMMISSIONER
OF LABOR OF THE STATE OF CONNECTICUT,

Respondent.

Petition For A Writ Of Certiorari
To The Second Circuit Court Of Appeals

RESPONDENT'S APPENDIX

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FAIR LABOR STANDARDS ACT

29 U.S.C.

§ 218. Relation to other laws.

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

(3)

No. 91-21

Supreme Court, U.S.
FILED
SEP 13 1991
OFFICE OF THE CLERK

In The

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October Term, 1990

OVERNITE TRANSPORTATION CO.,

Petitioner,

v.

BETTY L. TIANTI, COMMISSIONER OF LABOR OF THE STATE OF CONNECTICUT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF IN REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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I. ARGUMENT

In its brief, Respondent contends that the conflict between decisions of the United States Supreme Court and the various lower courts upon which Respondent relies is illusory and that none of the lower courts considering the issues raised in this Petition concur with Petitioner's position. Respondent's contention is contradicted, however, by the dissent in *Pacific Merchants Shipping Ass'n. v. Aubry*, 918 F.2d 1409 (9th Cir. 1990) and the opinion of the district court in that case. *See Pacific Merchants Shipping Ass'n v. Aubry*, 709 F.Supp. 1516 (C.D. Cal. 1989).[1]

Aubry concerned a claim by various maritime workers for overtime wages under California overtime wage laws. These workers were employed on vessels which operated over and around the oil fields located in the Santa Barbara Channel off the California coast. The employees were organized into crews that worked seven days on the vessels followed by seven days rest on shore. According to the dissent, these employees were primarily employed on the high seas within the meaning of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1988), and were exempt from the overtime wage provisions of that Act. 918 F.2d at 1427. Based on these facts, the dissenting judge in *Aubry* concluded that California overtime wage laws were preempted by both federal admiralty law and the FLSA. *Id.* at 1428-1430.

With respect to the conclusion that the California overtime pay provisions were preempted by federal admiralty law, the dissent found that maritime employment contracts are traditionally a matter of federal admiralty law, not state law. It further determined that under admiralty law and cus-

[1] A petition for writ of certiorari was filed in *Aubry* on or about July 17, 1991, Docket No. 91-142. In *Aubry*, the state of California attempts to require payment of overtime wages to maritime workers. The issues relating to uniform federal regulation of employees whose activities affect maritime and interstate commerce and the right of a state to interfere with such regulation raised in the *Aubry* petition are in many respects similar to the issues raised in this case.

tomary maritime employment contracts, maritime employees do not receive overtime pay. The dissent concluded that this finding was reasonable:

> in light of the fact that the conditions under which maritime employees work, especially those working on the high seas, are substantially different from land-based employees. Land-based employees are able to return home every night after work whereas often in maritime situations employees are required to be transported to a work station on the high seas, remain at sea for days at a time and subsequently be transported back to land.

Id. at 1429.

Based on these findings as to the nature of the maritime industry and the hours worked by maritime employees, the dissent opined that state overtime wage laws interfere with the proper harmony and uniformity of existing federal admiralty law. *Id.* at 1428. Accordingly, the dissent concluded that federal admiralty law preempts state overtime wage laws. *Id.* at 1429.

As Overnite demonstrated in its initial brief, interstate transportation workers, like maritime workers, do not work a traditional nine-to-five day or a forty-hour week. As a result of the economics of the interstate trucking business, truck drivers, like maritime workers, may work for long periods of time and then rest for long periods of time. For example, a truck driver may work eighty hours one week and no hours the next week. Under traditional state overtime wage laws, the truck driver would be entitled to forty hours of overtime wages for the first week, even though he averaged only forty hours per week over two weeks. Truck drivers, like maritime workers, airline workers and other interstate transportation workers, fall outside of the purview of traditional overtime wage statutes, which are based upon a nine-to-five day and a forty hour week. This is one reason that Congress exempted

interstate transportation workers from the overtime pay provisions of the FLSA. This is also one of the main reasons that state overtime wage laws should not be applied to interstate transportation workers.

With respect to preemption by the FLSA, the *Aubry* dissent found that maritime workers are exempt from federal overtime wage regulations under Section 13 of the FLSA. 29 U.S.C. § 213(b)(6). Moreover, the dissent found that Congress did not intend to allow states to enact overtime wage regulations which conflict with the exemptions from federal overtime wage regulations. *Id.* at 1430. Accordingly, the dissent concluded that state overtime wage regulations are preempted by the FLSA. *Id.* Since maritime workers and interstate transportation workers are indistinguishable, in terms of congressional intent as manifested in the FLSA and the exemptions contained in Section 13 of that Act, the Connecticut overtime wage regulations at issue in this case should be preempted for the same reasons that the *Aubry* dissent concluded that the California regulations should be preempted.

The more important point to be gleaned from *Aubry* and this case is that if state overtime wage laws extend to maritime workers and interstate transportation workers, both of whom are exempt from federal overtime wage provisions under Section 213 of the FLSA, then by logical extension, *every category of employee* who is exempt from the overtime wage provisions of the FLSA can be subject to state overtime wage laws. The FLSA makes no distinction between the classes of workers who are exempt from federal overtime wage laws under Section 213. Accordingly, if states can regulate one class of exempt employees, they can regulate *every* class of exempt employees. Thus, under the analysis of the court below, states can require payment of overtime wages to bona fide executives and administrators, farmers and other agricultural workers, baby sitters, commission salesmen, employees who transfer or prepare fresh fruits and vegetables, fire fighters, lumberjacks and a host of other classes of employees who traditionally have not been subject to overtime wage laws.

See 29 U.S.C. § 213. Unless the decision of the court below is reviewed by this Court, the door will be open for states to expand dramatically the scope of overtime wage laws and cause the severe dislocation of a number of important industries.

As Overnite submitted in its Petition, Congress did not intend to permit the states to override the exemptions contained in Section 213 of the FLSA or intrude into traditional areas of federal regulation through state overtime wage provisions. Accordingly, Section 218 of the FLSA, the "savings clause", *cannot* apply to employees who are exempt from the FLSA under Section 213. This case is before this Court because a number of lower courts have erroneously concluded that Section 218 does apply to employees who are exempt under Section 213. Consequently, the analyses applied by these courts violate the principles enunciated in this Court's prior decisions. Moreover, these analyses will allow the states to override two hundred years of federal regulation of maritime workers, one hundred years of federal regulation of railroad workers, sixty years of federal regulation of interstate transportation workers and fifty years of federal regulation of airline workers. This Court should review the lower courts' errors to insure that this Court's decisions and the historic federal scheme of regulation of interstate commerce are given full force and effect.

Respondent relies upon two decisions which, if anything, support and are consistent with Petitioner's position in this case. First, Respondent relies upon *California v. Zook*, 336 U.S. 725, *reh'g denied*, 337 U.S. 921 (1949). *Zook* held that, in the *absence of a conflict* between state and federal statutes, there is no reason to justify preemption of a state provision. *Id.* at 733. However, *Zook* also stated that where a conflict exists, the Court must be more conscious of the extent to which state law has an impact upon federal law. *Id.* at 733-735. Respondent contends that there is no conflict between state and federal law and policy in this case and, therefore, that *Zook* supports its claim that there is no preemption. However, as

Petitioner sets forth in detail in its initial brief and as the *Aubry* case points out, there is a substantial conflict between state and federal law in this case. Therefore, the Court should examine closely the nature of the conflict and the impact of Connecticut overtime wage laws upon federal law and policy.

Respondent also relies upon *Pierce v. Cook & Co*, 437 F.2d 1119 (10th Cir. 1970). *Pierce* involved whether the Motor Carrier Act superseded state tort law with respect to the negligence or wrongful death liability of a shipper. *Pierce* has nothing to do with the issues before the Court. State tort law does not conflict with or have a negative impact upon federal law regulating interstate commerce or the hours of service of employees working in interstate commerce. On the other hand, the Connecticut Wage and Hour Act conflicts with and has a direct and substantial negative impact upon these federal regulations. Therefore, unlike the state tort law at issue in *Pierce*, the Connecticut Wage and Hour Act is preempted by federal law.

II. CONCLUSION

For the reasons set forth above, and in Overnite's Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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